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Supt. Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1909

No. 707

THE PRUDENTIAL INSURANCE COMPANY, APPELLANT,

vs.

BENJAMIN BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED DECEMBER 24, 1909.

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INDEX

	Original	Print
Proceedings in Supreme Court of South Carolina	a	1
Rule to show cause	a	1
Petition for injunction and equitable relief	3	2
Exhibit "A"—Comparison of premium and other taxes paid to State of South Carolina on 1943 and 1944 business by Prudential, etc.	15	10
Acknowledgment of service	17	11
Demurrer to petition	20	11
Return to rule to show cause and reply to petition	23	13
Opinion, per curiam	30	18
Petition for rehearing	37	29
Order denying petition for rehearing	43a	34
Notice of motion for leave to file statement of real estate taxes paid in South Carolina	44	35
Form of order granting motion for leave to file statement of real estate taxes paid in South Carolina	45	35
Statement of real estate taxes paid in South Carolina	46	36

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—2794

	Original	Print
Proceedings in Supreme Court of South Carolina—Continued		
Order refusing motion for leave to file statement of real estate taxes paid in South Carolina	48	36
Order substituting party respondent	49	37
Petition for appeal	50	37
Assignments of error	55	40
Order allowing appeal	61	43
Citation and service (omitted in printing)	63	
Bond on appeal (omitted in printing)	64	
Praecipe for transcript of record	65	44
Clerk's certificate	68	
Statement of points to be relied upon and designation of record	69	47
Order noting probable jurisdiction	70	47

[fol. a]

IN THE SUPREME COURT OF SOUTH CAROLINA

In the Original Jurisdiction

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

against

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

RULE TO SHOW CAUSE

[fol. 1] It appearing by the verified Petition hereto attached that a matter of large public interest is involved in this proceeding and that there are questions which should be decided promptly by this Court, it is, on motion of McKay & McKay, Attorneys for Petitioner, The Prudential Insurance Company of America,

Ordered that the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, do show cause before the Supreme Court of South Carolina on the 14 day of May 1945, why the prayer of the Petition should not be granted. It is

Further Ordered that the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, be restrained and enjoined from attempting to collect from the Petitioner the taxes involved in this proceeding or from suspending the license of the Petitioner to conduct its business in South Carolina for failure to pay such taxes, until the further Order of this Court. It is

Further Ordered that the Petitioner do within a reasonable time deposit with the Clerk of this Court its certified check in the amount of Fourteen Thousand Nine Hundred Ninety-four and 1/100 Dollars ($14,994.01), being the amount of said taxes involved, to be held pending the determination of this cause. It is

[fol. 2] Further Ordered that this cause be put down for hearing on the date above mentioned before the entire Court.

Let copies of this Rule and of the Petition be forthwith served on the Respondent, D. D. Murphy, as Insurance Com-

missioner of the State of South Carolina and on the Attorney General of the State.

T. H. Stukes, Justice, Supreme Court of South Carolina.

Manning, S. C., 29 day of March, 1945.

[fol. 3] IN SUPREME COURT OF SOUTH CAROLINA

PETITION FOR INJUNCTION AND EQUITABLE RELIEF

Now comes The Prudential Insurance Company of America, the Petitioner herein, by McKay & McKay, its attorneys, and for its cause of action herein says:

1. The Prudential Insurance Company of America (hereinafter called the "Company") is a mutual life insurance corporation organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Newark, County of Essex, State of New Jersey.

2. That the Respondent, D. D. Murphy, is the duly qualified Insurance Commissioner for the State of South Carolina, and as such is charged by law with the licensing of your Petitioner to carry on its business in the State of South Carolina, and to collect therefrom the taxes and charges hereinafter referred to.

3. The Company commenced business in 1875. It is engaged exclusively in the business of issuing all forms of life insurance, group insurance, and annuity contracts. All of the Company's activities are in furtherance of and incidental to its insurance business.

4. All the business and operations of the Company are conducted by its Board of Directors and executive management at and from its Home Office in Newark, New Jersey, and radiate from that office into all of the forty-eight states of the United States, the District of Columbia, the Territory [fol. 4] of Hawaii, and the Dominion of Canada. The Board of Directors meets only at the Home Office of the Company in New Jersey, and all the executive officers of the Company are located and act as such at said Home Office. Field representatives of the Company (by which is meant its entire agency selling force and all its representatives and em-

ployees outside its Home Office) have no authority to transact business independently on behalf of the Company, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Company acting at the Home Office in New Jersey.

5. Policies insuring the lives of persons are issued by the Company at the present time in various forms, including Life, Endowment and Term insurance, and cover various fields of insurance, including Ordinary, Group and Industrial. Annuity contracts issued by the Company at the present time include both immediate and deferred annuities. On December 31, 1944, the Company had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. During the year 1944 the Company issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such [fol. 5] lives. During the year 1944 the Company collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,690,781.93 on annuity contracts.

6. The terms and conditions of all types of insurance policies and annuity contracts are determined by the officers of the Company and their assistants at the Home Office. Applications for insurance policies, annuity contracts, policy loans, modifications of contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory in which the applicant resides. Medical examinations and investigations of prospective risks are made by local physicians and investigators. All applications and reports are transmitted by its agents from the states in which they are received, by mail, telegraph and telephone, across state lines to the Home Office in Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued. After issuance, policies of insurance and annuity contracts are transmitted from its Home Office across state lines to its respective agents for delivery to the insured.

7. The investments made by the Company are governed by detailed statutes of the State of New Jersey and, subject to those statutes, are rigidly controlled by the Board of Directors of the Company acting at its Home Office in New Jersey, which specifically authorizes every investment made by the Company. Such investments consist of bonds issued or guaranteed by the United States Government; bonds of [fol. 6] the various states of the United States and their political sub-divisions; bonds issued by the Dominion of Canada and its political sub-divisions; railroad, public utility and industrial bonds of corporations operating throughout the United States and Canada; preferred and common stocks of such corporations; and loans secured by mortgage on real estate located in nearly all of the states of the United States and provinces of Canada. In addition, the Company maintains cash balances in 514 banks and trust companies located throughout the United States and Dominion of Canada. All the Bank deposits hereinabove referred to are subject to the control of the Board of Directors and the executive officers of the Company acting at its Home Office in Newark, New Jersey; all the securities purchased by the Company, including mortgages but excepting (during wartime) Canadian securities, are delivered to it in the State of New Jersey and physically kept in the vaults of the Company at the Home Office in Newark, New Jersey (except securities deposited with governmental authorities as required by law or in connection with court proceedings), and are subject to the exclusive control and management of the Board of Directors and the executive officers of the Company acting at the Home Office in New Jersey. As of December 31, 1944, the assets of the Company amounted to $5,856,880,814.84.

8. The performance of the life insurance and annuity contracts, and the operation of the life insurance business of the Company in all its manifold phases, require the move- [fol. 7] ment of information, documents and money on a large scale across state lines. During the year 1944 the Company expended approximately $1,277,000 for postage, telephone, telegraph and express services, approximately $351,000 for traveling expenses, approximately $475,000 for advertising in magazines circulating throughout the United States, and approximately $900,000 in radio programs broadcast throughout the nation. Inherent in the Company's business is the continuous use of the channels of in-

terstate commerce for the transmission of such information, documents and money.

9. The Company was originally authorized to do business in the State of South Carolina, under license issued pursuant to the laws of said State, in the year 1897 and has since that time received annual renewals of its said license whereby it has been authorized to do business in the State of South Carolina up to and including March 31, 1945. On December 31, 1944, the Company maintained 4 District Offices in the State of South Carolina, employed 12 persons in said Offices and had contracts with 21 agents engaged in selling insurance therein. At that time the Company had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,-062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of such residents. All the business in which the Company is now engaged in the State of [fol. 8], South Carolina, and all the business which the Company has done in such State in the past, has been of the nature and performed in the manner hereinabove in paragraphs numbered 1 and 3 through 8 above set forth. All such business has been and is interstate commerce.

10. Section 7948 of the Code of Laws of South Carolina, 1942, provides in substance that the Insurance Commissioner shall require each foreign Life Insurance Company "to pay as an additional and graded license fee"; 2% on "the total premiums, *i. e.*, total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the Company has done business in this State since making such last return." Provided, that if a sworn statement is filed showing investment in certain South Carolina securities or property to the extent of—

"(a) ¾ of the reserve on all policies issued in South Carolina, the rate shall be 1¾%;
"(b) ½ of said reserves, 1½%;
"(c) ¾ of said reserves, 1¼%;
"(d) all of said reserves, 1%."

The same Section also provides in substance that the Insurance Commissioner shall require each foreign Health and Accident Insurance Company "to pay as an additional and graduated license fee", 2% on "the total premiums, *i. e.*, total income or total receipts from the State, less return premiums for cancellations on risks in this State dur- [fol. 9] ing the time the Company has done business in this State since such last return." Provided, that if a sworn statement is filed showing investment in certain South Carolina securities or property to the extent of—

"(a) ¼ of the premium receipts on all risks in South Carolina, the rate shall be 1¾%;
"(b) ½ of said receipts, 1½%;
"(c) ¾ of said receipts, 1¼%;
"(d) all of said receipts, 1%."

(Sec. 7948 requires semi-annual reports and payments.)

11. Section 7949 of the Code of Laws of South Carolina, 1942, provides in substance that the Insurance Commissioner of South Carolina require "all Insurance Companies doing business in this State, including all domestic companies or other companies of any class licensed by such Insurance Commissioner and not incorporated under the laws of South Carolina, to pay, in addition to the annual license fee now provided by law, a graduated licensed fee in an amount equal to 1% of the total premiums collected in the State less return premiums for cancellation on risks: Provided that the terms hereof shall not apply to domestic Insurance Companies: * * *"

"This Section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws but is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for State purposes."

(Sec. 7949 requires annual report and payment.)

[fol. 10] 12. The taxes provided for under Sections 7948 and 7949, referred to in the two preceding paragraphs, are levied solely against foreign Insurance Companies, domestic Insurance Companies being specifically exempted therefrom; and there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of. The taxes involved create a burden upon the business of your Petitioner, which business is

strictly interstate commerce, and discriminate against your Petitioner in favor of domestic Companies, and are illegal and void in that they violate, in part, the constitution of the State of South Carolina, and violate the Constitution of the United States in the following respects:

(1) Said sections impose a tax upon commerce between the several states of the United States, which tax constitutes a direct burden upon and interference with such commerce in violation of Article I, Section VIII, of the Constitution of the United States, which grants to Congress exclusive power to regulate commerce with foreign nations and among the several states.

(2) Said sections impose a tax upon commerce between the several states of the United States, which tax is a discrimination against such interstate commerce and against all foreign insurance companies carrying on such interstate commerce in the State of South Carolina, and is a discrimination in favor of the business of the life insurance Companies organized under the laws of the State of South Carolina, in viola- [fol. 11] tion of Article I, Section VIII, of the Constitution of the United States, which grants to Congress exclusive power to regulate commerce with foreign nations and among the several states.

(3) Said sections and the tax imposed thereby deny to Petitioner and to other foreign life insurance companies similarly situated, the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 5 of the Constitution of the State of South Carolina 1895.

(4) Said sections and the tax imposed thereby deprive Petitioner, and other foreign life insurance companies similarly situated, of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 5 of the Constitution of the State of South Carolina, 1895.

13. The discrimination which is thus made against the interstate trade and commerce of your Petitioner and other foreign Insurance Companies doing business in South Carolina, is shown by the taxes demanded of this Petitioner,

pursuant to Sections hereinabove mentioned, on its business in South Carolina, which greatly exceed the taxes required of the five most comparable domestic Insurance Companies upon comparable business. The Statement made a part hereof and attached as Exhibit "A" furnishes examples of resulting unlawful discrimination.

[fol. 12] 14. The taxes paid by your Petitioner alone to the State of South Carolina during the year 1944, under Sections of the Code herein objected to, amounted to almost fifty per cent (50%) of the total cost of operating the entire Insurance Department of the State of South Carolina for the calendar year 1944, for which the South Carolina Legislature appropriated the amount of $45,068.00, and, on information and belief, avers the same will obtain as to 1945. And further avers, on information and belief, the total tax imposed and assessed under Sections 7948 and 7949, paid in the calendar year 1944, and payable during the year 1945, was and will be many times the total cost of operating the entire Insurance Department of the State of South Carolina for the calendar years 1944 and 1945, respectively.

15. That your Petitioner would further show the Court that, as hereinabove stated, it has been duly licensed in the State of South Carolina for a long number of years to carry on its business of a foreign Insurance Company, with a number of branch offices and agents in the State of South Carolina. That it has heretofore at all times promptly paid all taxes and license fees lawfully assessed against it, but the respondent Insurance Commissioner has demanded and is required by the Sections of the Code hereinabove mentioned to demand the taxes therein provided for, and even though this Petitioner has been advised and avers that said taxes and said demands of the Insurance Commissioner are not lawful and are without warrant of law, unless [fol. 13] the demands of the Insurance Commissioner are met and the taxes paid before 31st March, 1945, your Petitioner will be denied a Certificate of Authority to do business in the State of South Carolina and thus will be irreparably damaged by virtue of such action on the part of the Respondent herein.

16. Your Petitioner is further advised and believes that there is no provision in the law of South Carolina permitting it to pay under protest the taxes demanded and to bring suit for a recovery thereof, and hence, its sole right to protection arises under the application made herein for equi-

table relief to prevent loss that will result if the demands for payment of these unlawful taxes are met, or for the irreparable damage that will ensue if it fails and refuses to pay such unlawful demands and suffers a revocation or denial of its license to carry on its business long established in the State of South Carolina.

17. That your Petitioner has filed the Returns required under Sections 7948 and 7949 of the Code, and is ready, willing and able to pay the taxes contemplated thereunder and demanded by the Respondent Insurance Commissioner, provided said taxes are lawful, and is further prepared to deposit such amount with this Court, in such form as the Court may direct, pending its decision herein.

Wherefore this Petitioner prays,

First: That the Respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, be enjoined and restrained, until the further Order of this Court, from [fol. 14] collecting the license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and from revoking or suspending the Certificates of Authority granted to this Company, its officers and agents, for your Petitioner's failure to pay such taxes.

Second: That this Court declare that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are unconstitutional, null and void in violation of the Commerce Clause of and the Fourteenth Amendment to the Constitution of the United States and of Article I, Section 5 of the Constitution of the State of South Carolina, 1895, and perpetually enjoin any attempts to enforce compliance therewith.

Third: That this Honorable Court do issue its Rule to the Respondent Insurance Commissioner to show why the relief demanded herein should not be granted, and deferentially suggests that your Petitioner be permitted in connection therewith to deposit with the Clerk of this Court its certified check or such other medium of payment or security as the Court may direct in the amount of the taxes involved to abide the determination of this cause.

Fourth: For such other and further relief as may be just and proper.

McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., — March, 1945.

[fol. 15]

Exhibit "A" to Petition

Comparison of Premium and Other Taxes Paid to the State of South Carolina on 1943 and 1944 Business by the Prudential and by the Five Largest South Carolina Domestic Life Insurance Companies

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
	1943 South Carolina Premiums Column #1 Schedule T Life and Casualty*	State Premium Tax Thereon	1944 South Carolina Premiums Column #1 Schedule T Life and Casualty*	State Premium Tax Thereon	All Other State or Local Taxes Paid in 1944†	Total of Column 2 and Column 5	Total of Column 4 and Column 5
The Prudential Insurance Company of America	$858,915.82	$18,496.87	$876,305.61	$19,676.94	$3,103.92	$21,600.79	$22,780.86
Liberty Life Ins. Co.	5,339,320.20	—0—	6,164,600.50	—0—	13,178.40	13,178.40	13,178.40
Carolina Life Ins. Co.	1,748,356.86	—0—	2,028,153.03	—0—	12,171.75	12,171.75	12,171.75
Atlantic Coast Life Insurance Company	937,055.99	—0—	1,182,037.72	—0—	1,618.35	1,618.35	1,618.35
Palmetto State Life Insurance Company	931,768.12	—0—	1,014275.56 ~~1,600,275.56~~	—0—	5,960.30	5,960.30	5,960.30
Capitol Life and Health Insurance Company	500,761.13	—0—	783,675.84	—0—	2,975.18	2,975.18	2,975.18

* Figures taken from annual statement on file in South Carolina Insurance Department.

† These figures include, for the South Carolina companies, social security taxes and taxes paid in other states in which the respective companies are doing business, which your petitioner was unable to eliminate from the figures given in the annual statements. They do not include real estate taxes.

[fol. 16] *Duly sworn to by John A. Amerman. Jurat omitted in printing.*

[fols. 17-19] ACKNOWLEDGMENT OF SERVICE

Due and legal service of certified copy of Petition and Rule to Show Cause in this case acknowledged at Columbia, S. C., this 30th day of March, 1945, and such copy retained without prejudice.

(Sgd.) D. D. Murphy, Insurance Commissioner of the State of South Carolina. (Sgd.) John M. Daniel, Attorney General of the State of South Carolina.

[fol. 20] IN SUPREME COURT OF SOUTH CAROLINA

DEMURRER

The respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, as reply to the petition and as a return to the Rule to Show Cause herein, demurs to the petition upon the following grounds:

First

The petition fails to state a cause of action for the relief demanded in that the petition on its face shows that the petitioner is a foreign insurance company and one of a class of business corporations conducting a voluminous and profitable business within the State of South Carolina by permission of the State, a prerequisite of which is the payment of an excise or privilege tax on insurance premiums collected by it in the State of South Carolina, without the payment of such privilege tax the petitioner is not authorized to do business within the State after March 31, 1945.

Second

The petition upon its face shows that the contention of the petitioner is based upon the theory that the insurance business conducted by it is interstate commerce and that the privilege tax required of the petitioner by the State as a condition precedent to do such business, is an unlawful burden upon interstate commerce. The Court will take judicial notice of an Act of Congress passed on the 27th day of February, 1945, which declares a moratorium period

until the first day of January, 1948, during which time insurance should not be regarded as interstate commerce. The Act of Congress reads, in part, as follows:

"That the Congress hereby declares that the continued regulation and taxation by the several States [fol. 21] of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of taxation of such business by the several States.

"Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Third

The petition upon its face shows that there is no discrimination in the law of the State of South Carolin levying a tax upon premiums collected by the plaintiff within the State as between foreign insurance companies, and that all foreign insurance companies are required to pay the same tax in character and at the same rate.

Fourth

The petition shows on its face that this Court lacks jurisdiction in the premises for the reason that said action is one against the State of South Carolina, in that:

(a) The petitioner in paragraphs 10, 11, 13, 14 and 15 of the petition shows that the insurance Commissioner of the State of South Carolina in demanding and collecting the excise tax complained of has been and is acting pursuant to a valid statute of the State;

(b) The basis of any allegation of unlawful conduct on the part of the Commissioner is the alleged interstate commerce character of the business conducted by petitioner;

[fol. 22] (c) Under the Act of Congress passed February 27, 1945, the business of insurance has no interstate commerce characteristics so far as the taxing and regulating of insurance is concerned prior to January 1, 1948;

(d) The petitioner admits that he has paid all taxes lawfully assessed, including the excise tax on premiums on business done in this State to March 31, 1945;

(e) The petition fails to show any change in the excise tax demanded of the petitioner at this time from that which it has declared to be lawful and has paid in preceding years, and Congress having declared a moratorium against Federal interference at any time prior to January 1, 1948, the tax demanded by the Commissioner as a condition precedent to petitioner's right to do business beginning April 1, 1945, is the same status as heretofore and is lawful.

(f) An action against a State official for the doing of a lawful act under valid statutory authority is an action against the State.

(g) The petition does not show on its face that the State of South Carolina has consented to be sued in this action.

John M. Daniel, Attorney General, M. J. Hough, T. C. Callison, Assistants Attorney General, Attorneys for Respondent.

[fol. 23] I, T. C. Callison, Assistant Attorney General for the State of South Carolina, attorney for the respondent, hereby certify that the foregoing demurrer is meritorious and not interposed for the purpose of delay.

T. C. Callison, Assistant Attorney General.

April 25, 1945.

IN SUPREME COURT OF SOUTH CAROLINA

RETURN TO RULE TO SHOW CAUSE AND REPLY TO PETITION

The respondent as a reply to the petition herein, and as a return to the Rule to Show Cause, respectfully shows to the Court:

First

The respondent, on information and belief, admits the allegations of paragraphs 1, 2, 3, 4, 5 and 6 of the petition.

Second

Replying to the allegations contained in paragraphs 7, 8 and 9 of the petition, the respondent, on information and

belief admits the allegations with reference to the manner and method of conducting the business of the petitioner and admits that by the method used by the petitioner, it has accumulated great wealth and concentrated same in the State of New Jersey, and alleges that much of the accumulated wealth referred to therein has been collected from citizens of the State of South Carolina. The respondent denies that the conduct of petitioner's business constitutes interstate commerce or comes within the interstate commerce clause as related to the power and authority of the State of South Carolina, in the exercise of its police power, to tax and to [fol. 24] regulate the business of the petitioner as a foreign insurance company on the business it actually conducts within the State of South Carolina.

Third

On information and belief the respondent admits the allegations contained in paragraphs 10 and 11 of the petition and further alleges, in connection therewith, that the law of the State of South Carolina makes no distinction between foreign insurance companies in levying and collecting the privilege or excise tax referred to. All foreign insurance companies, as a class, are required to pay the tax on premiums collected in this state. The State, in the exercise of its police power, placed said tax upon the petitioner and all other foreign insurance companies as a prerequisite to extending to them the privilege of doing business in this State. Without the payment of this excise tax the petitioner is without authority to conduct any business within the State of South Carolina. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, partly set out in said paragraphs are valid laws of the State of South Carolina which the petitioner has recognized as such and under which it has paid all taxes assessed against it through the year ending March 31, 1945, and which Sections are still valid and enforceable laws of this State.

Fourth

Replying to the allegations of the 12th paragraph of the petition, the respondent, D. D. Murphy, Insurance Commissioner of the State of South Carolina, admits that the State of South Carolina, acting within its sovereign capacity as [fol. 25] a state and in the exercise of its police power, has

under the provisions of Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, levied upon the petitioner, and all foreign insurance companies seeking to do business in the State of South Carolina, as a class, the tax therein provided for as a condition precedent to their being permitted to conduct an insurance business within the State. He admits further that said tax is not levied upon domestic insurance companies of this state, which companies constitute an entirely different class from that of foreign insurance companies doing business in this state.

The respondent denies that there is any unfair, inequitable or illegal discrimination against the petitioner or that such tax creates a burden upon interstate commerce. Petitioner shows by its petition that all of its business activities are centered within the State of New Jersey and its great amount of wealth is concentrated in said State. Its only purpose for entering the State of South Carolina to do business therein is to add to its accumulated wealth, concentrated in the State of New Jersey, from such profits as it may derive from its business in the State of South Carolina. Domestic insurance companies have their home offices in the State of South Carolina and such wealth as they accumulate is concentrated within the state and subject to all of the laws and regulations of the State of South Carolina. That the State of South Carolina, in its sovereign capacity as a state and in the exercise of its police power, has the legal and constitutional right to act for the best interests of the state to encourage the development of industries within said state, has a legal right to determine the conditions precedent for foreign insurance companies to enter the state, which right is recognized by the Congress of the United [fol. 26] States in Act passed on the 27th day of February, 1945, as shown by the following quotation from said Act:

> "That the Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

Fifth

Replying to the 13th paragraph of the petition, the respondent denies that the tax assessed against premiums on insurance collected in South Carolina by foreign insurance companies constitute illegal discrimination against such foreign corporations in favor of domestic insurance companies but alleges that the same is a fair and just privilege tax which the petitioner has paid from the time it entered the State of South Carolina to do business until the present time. The petitioner is now conducting its business of insurance within this state unlawfully and in violation of the valid statutory law of the State of South Carolina, although it is enjoying the advantages and benefits of the laws of this state and expects the laws of this state to protect its rights and interests in connection with contracts of insurance written within the state, and this it seeks to do without contributing to the revenue of the state as every other foreign insurance company doing business in this state has done.

[fol. 27]

Sixth

Replying to the 14th paragraph of the petition, the respondent, on information and belief, admits the allegations therein contained but alleges that the privilege tax charged against foreign insurance companies to do business in the State of South Carolina has no relation to the cost of the operation of the Insurance Department of the State of South Carolina, but is purely a tax assessed against said company for the privilege of doing business in the state and the revenue derived therefrom is applicable to any state use the Legislature may deem proper to apply the same to.

Seventh

Replying to the 15th paragraph of the petition, respondent admits that the petitioner has been heretofore licensed to do business in the State of South Carolina and that the petitioner has promptly paid all taxes and license fees assessed against it and that the respondent has demanded of the petitioner that it pay the taxes assessed before the 31st day of March, 1945, in order to renew its certificate of authority to do business within the state but denies that the respondent has damaged the petitioner by refusing to issue such certificate, and alleges that any

damage which the petitioner may suffer will be the result of its own conduct in refusing to pay for the right to do business within the State of South Carolina as required by the Statute in such cases made and provided.

Eighth

Replying to the remaining paragraphs of the petition, the respondent admits that there is no provision of law of [fol. 28] South Carolina permitting the petitioner to pay the premium tax referred to under protest as the only redress the state has for the non-payment of such tax is to refuse the petitioner the permit to do business within the state. The respondent denied that the petitioner is entitled to the relief sought in the premises and demands that the petitioner be required to pay the tax in question as all other foreign insurance companies have done, without which the respondent alleges that the petitioner has no authority to continue to do business within the State.

Ninth

Further replying to the petition and as a further defense thereto, the respondent alleges that this action is an action against the State of South Carolina and has been brought without obtaining the permission of the state to bring same, in that the purpose of said action is to enjoin and restrain the Insurance Commissioner of this state from performing, a purely ministerial duty under valid and constitutional law of the State of South Carolina. The petition nowhere alleges that the Commissioner is violating or has violated any law but on the contrary alleges in paragraph 15 of the petition that it has promptly paid all taxes and license fees lawfully assessed against it (which includes the premium tax provided for in Sections 7948 and 7949 of the Code); that there has been no change in the law of the State of South Carolina with reference to the levying and collection of said excise tax since the petitioner last paid the same, and the Act of Congress referred to and quoted from in paragraph 4 of this Return preserves the status of the law of each state as it relates to the power [fol. 29] and authority of the states to tax and regulate foreign insurance companies, conducting business within the several states, until the first day of January, 1948.

Tenth

That except as hereinbefore specifically admitted, all material allegations of the petition are respectfully denied.

Wherefore the respondent prays that this Return to the rule be adjudged sufficient and that the petition be dismissed and that the injunction heretofore issued be dissolved.

John M. Daniel, Attorney General, M. J. Hough, T. C. Callison, Assistants, Attorneys for Respondent.

[fol. 30] IN THE SUPREME COURT OF SOUTH CAROLINA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

IN THE ORIGINAL JURISDICTION

Case No. 2628

OPINION No. 15773—Filed September 13, 1945

PETITION DISMISSED

McKay & McKay, of Columbia, for petitioner.

John M. Daniel, Attorney General, M. J. Hough and T. C. Callison, Assistant Attorneys General, all of Columbia, for respondent.

Per CURIAM:

For a great many years, perforce the decision of the Supreme Court of the United States in Paul vs. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of United States vs. Southeastern Underwriters Ass'n.,

322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, the latter held that when the insurance business crosses state boundaries, it is interstate commerce. Because of the complexities and colossal nature of this far-flung business, it was feared in many quarters that considerable chaos might result from the departure of the Southeastern Underwriters decision from the former rule, but for an Act of Congress which was soon thereafter passed.

The latter is known as the McCarran Act, passed February 27, 1945, Public Law 15, 79th Congress. The portions pertinent to the present controversy are set out below:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the busi- [fol. 31] ness of insurance to the extent that such business is not regulated by State law."

Unquoted Sections 3 and 4 preserve the applicability of certain provisions of the Sherman Act and the applicability of the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act.

The Prudential Insurance Company of America is in this State a "foreign" life insurance company, that is, it is incorporated under the laws of New Jersey and its home office and the bulk of its property are located in the city of Newark in that State. However, it has solicited business and sold insurance contracts and policies to residents of South Carolina since the year 1897. At the end of 1944 it had in force in this State 26,373 policies insuring the lives of about twenty thousand persons for amounts aggregating over thirty million dollars; and paid claims in that year of $457,602.28 on policies covering the lives of South Carolinians. (In the face of these figures it does not appear that the tax law now resisted was "hostile in conception" or is "burdensome in result",—the words of Mr. Justice Cardozo in Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032.)

The Company brought this action in the Original Jurisdiction of this Court, by permission, in attack upon the validity of the license tax of three per cent which it has heretofore paid on premiums collected here, under the provisions of the present Sections 7948 and 7949 of the South Carolina Code of Laws of 1942. While the tax is a flat one, as indicated, it is subject to a graduated reduction in proportion to the amount of certain financial investments which the company may make and report in the State of South Carolina.

It is not contended that the latter or any other feature of the law under attack is discriminatory against petitioner as compared with any other member of the class to which it belongs, to wit, "foreign" insurance companies. But it is alleged that this tax which has before been paid without protest by petitioner has become invalid, and therefore unenforceable, by reason of the law declared in the Southeastern Underwriters case, supra, in view of the Federal constitutional authorization of Congress to regulate commerce among the states, and the many decisions of the Federal Courts thereabout. It is also alleged in the petition that the tax violates a section of our State Constitution, but the point was not argued and is, therefore, deemed to have been abandoned in accord with the established rule.

Petitioner presents a two-pronged attack, first that the tax constitutes a burden upon its interstate business, transacted in part within the state, and, second, that it is discriminatory against petitioner for it is not applicable to

insurance corporations of the state, domestic companies, which are exempted from the law's provisions. The respondent, the Insurance Commissioner of the state and charged with the enforcement of the law, first contends that the proceeding is really against the State itself, which is immune from suit without its express permission. His demurrer and return also raise the other issues which will be discussed.

Disposition will be first made of the point of the respondent that the action is not maintainable because it is in reality against the State, without its permission, and, therefore, in violation of its sovereign immunity from suit. This is foreclosed by former pronouncements of this Court, in view of the fact that there is no adequate remedy at law, such as payment of the taxes under protest and suit for recovery, if they are illegally assessed. It was said in Santee River Cypress Co. vs. Query, 168 S. C. 112, 167 S. E. 22, as follows: "It is not only within the power of a Court of equity, but the duty rests upon it, to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer. Ware Shoals Mfg. Co. vs. Jones, 72 S. C. 211, 58 S. E. 811." The eleventh amendment to the Federal Con-
[fol. 32] stitution, attempted to be invoked by respondent, is expressly applicable only to the Courts of that jurisdiction. Federal Land Bank of Columbia vs. State Highway Department, 172 S. C. 174, 173 S. E. 284. State of Missouri vs. Fiske, 290 U. S. 18, 54 S. Ct. 18, 17 L. ed. —.

We proceed then to the heart of the controversy. It is the clear intent of Congress to refrain for the present from the regulation and taxation of insurance, even as to the activities of it which undoubtedly constitute interstate commerce under the authority of United States vs. Southeastern Underwriters Ass'n, supra, with the exceptions hereinabove noted.

It would be difficult, if not impossible, to compose clearer statements than are contained in Sections 1 and 2 (a) of the McCarran Act, which are quoted again for emphasis:

> "Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a "foreign" company, such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc., taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies. It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other nonresident insurance companies which may do business there) to which petitioner now objects, but the tax is not at all uncommon among the states. Annotations, 49 A. L. R. 726, 77 A. L. R. 1490 and 83 A. L. R. 464.

Thus, upon the showing made, there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the tax laws of this state, to which it is subject in the conduct of its business here.

Turning to the gravamen of the complaint, that the tax being upon interstate commerce is *ipso facto* a burden thereon, irrespective of discrimination, we see no reason on the record or in argument to hold that it was not intended to be included by Congress in the "taxation by the several states of the business of insurance", which the

McCarran Act declared is in the public interest and directed that the insurance business should continue to be subject thereto.

Congress is authorized by the Constitution of the United [fol. 33] States to regulate commerce between the states. The words of that great document are quite plain thereabout, as follows: "The Congress shall have power * * * (3) To regulate commerce with foreign nations, and among the several States, and with Indian tribes." Art. 1, par. 8.

We are unable to see therein any obstacle to the course of Congress in deliberately refraining from regulation of any particular field of interstate commerce, which course is clearly charted by the McCarran Act insofar as regulation by taxation of the insurance business is concerned, unless a necessity for uniformity should require the desistance of the states. We are unable to perceive the latter condition with respect to the taxation of insurance companies. Certainly they have thriven under the existing system of state taxation. The staggering figures in the record in this case, indicating the gigantic size of petitioner's business, prove it.

It is repeated for emphasis and clarity that there is no apparent necessity for uniformity of the rate of the premium receipts tax of the various states which would invalidate (on that account alone) state legislation upon the subject, which lies in a field deliberately and advisedly unoccupied by Congressional legislative action. Kelly vs. State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. ed 3. It might with equal reason be contended that the property tax assessments and rates should be the same in all states, which we think has never been proposed. See, for lack of a federal question in such a tax (at the time of that decision), Continental Assur. Co. vs. Tennessee, 311 U. S. 5, 61 S. Ct. 1, 85 L. ed. 5.

There is a very long-standing precedent for the propriety and efficacy of the McCarran Act. It is found in Cooley vs. Port Wardens, 12 How. (U. S.) 299, 13 L. ed. 996. There one of the major questions was the validity of a law of Pennsylvania fixing pilotage fees (the proceeds of which were applied to the relief of indigent local pilots and their dependents) affecting ocean shipping in interstate commerce. At the first session of Congress it was enacted on Aug. 7, 1789 (1 Stat. at Large 54) that pilots should be

under the regulations of the state laws, present and future, until further legislation by Congress. Upon the strength of the latter, the local law was upheld and the Court expressly said that the grant of commercial power to Congress (the commerce clause) does not contain any terms which exclude the states from exercising authority over its subject matter. The principle of this decision is stated in the modern text of American Jurisprudence, Vol. 11, p. 18, as follows: "Strictly speaking, Congress cannot delegate to the states its power over interstate and foreign commerce. However, where the subject is one upon which the states have the power to legislate in the absence of action by Congress, it may validly be provided by Congress that state statutes shall be controlling." And see the approving citation of it in the Minnesota Rate Cases (Simpson vs. Shepard) 230 U. S. 352, 57 L. ed. 1511, 33 S. Ct. 729, 48 L. N. S. 1151, Ann. Cas. 1916A, 18.

The author of the opinion of the Court in United States vs. Southeastern Underwriters Ass'n, supra, pointed the way to the course thus far followed by Congress when he said:

> "Another reason advanced to support the result of the cases which follow Paul vs. Virginia, has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this Court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though [fol. 34] subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the State and national interests involved can be accom-

modated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

From one of the supporting cases cited by the Court for the foregoing, New York Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 56 L. ed. 332, the following is quoted:

"There are cognate cases to the cited cases, of contracts incident to commerce, but not of themselves commerce. In Williams vs. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the commerce clause of the Constitution of the United States. Commerce was defined, quoting Mr. Justice Field, in Mobile County vs. Kimball, 102 U. S. 691, 702, 26 L. ed. 238, 241, to 'consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' The Court considered the definition comprehensive enough for the purpose of the case, and, testing its application, said, by Mr. Chief Justice Fuller: 'These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation.' The conclusion was supported by cases, among others, Paul vs. Virginia and Hooper vs. California. On the authority of the same cases and New York L. Ins. Co. vs. Cravens, in Ware & Leland vs. Mobile County, 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, it was held that contracts by brokers for the sale of cotton for future delivery, where the transactions were closed by contracts completed and executed in one state, although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not the subjects of interstate

commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company.'

"In Engel vs. O'Malley, 219 U. S. 128, 55 L. ed. 128, 31 Sup. Ct. Rep. 190, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. It was attacked as a violation of the commerce clause of the Constitution. The case was decided to be similar in principle to Ware & Leland vs. Mobile County and Williams vs. Fears, and the law was sustained."

In the dissenting opinion of the Chief Justice to the judgment of the majority in the Southeastern Underwriters case, he emphasized the confusion and conflict (between national and state jurisdictions) which he anticipated; but the most that he said concerning "state taxes which may now be thought to discriminate against the interstate commerce" (his words) was that they would be of seriously doubtful validity. And this was, of course, before the important enactment by Congress of the McCarran law, which was manifestly intended to allay such fears and doubts by [fol. 35] temporarily, at least, removing the grounds of them.

The old, but leading, case of Crutcher vs. Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649, contains the significant statement in the opinion that is emphasized in the following quotation:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, *unless Congress should see fit to interpose some contrary regulation on the subject.*"

In this instance Congress has seen fit to interpose, and has interposed, a "contrary regulation on the subject" by passage of the McCarran Act which is quite simple in its effect, that is, that for the present the regulation (with

certain now irrelevant exceptions) and taxation of the interstate business of insurance shall continue by the states. The Act goes further, that any possible doubt may be removed, by the inclusion of the provision to the effect that there is no silence of Congress which might be construed to mean that this form of interstate commerce should go on without regulation or any state legislation which might be held to be a burden upon it and, therefore, in conflict with the Commerce clause of the Constitution.

Congress has plenary power over interstate commerce and we know of no legal obstacle to the exercise of it embodied in the McCarran Act. "Since the commerce clause of the Federal Constitution is not a limitation upon the power of Congress, a statute enacted by Congress, for the District of Columbia, imposing a tax upon the privilege of doing business within the district, is not subject to the objection that it interferes with or is a burden upon interstate commerce. General Electric Co. vs. District of Columbia (1940) 71 App. D. C. 321, 110 F. (2d) 261; Colgate Palmolive Peet Co. vs. District of Columbia (1940) 71 App. D. C. 324, 110 F. (2d) 264. Both of these decisions followed Neild vs. District of Columbia (1940) 71 App. D. C. 306, 110 F. (2d) 246, which involved a copartnership rather than a foreign corporation." 139 A. L. R. 951.

The brunt of petitioner's argument has been answered in what has been said, but it is incidentally also contended that the application of the tax to the premiums received by petitioner upon its South Carolina business violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal constitution (which are also embraced in Art. 1, Sec. 5 of our State Constitution). But, in any view of it, it does not, under the decisions of the United States Supreme Court. There need only be cited the current case of Lincoln Nat. Life Ins. Co. vs. Read, — U. S. — 65 S. Ct. 1220, — L. ed. —, which was decided during the pendency of this proceeding.

Report of the latter case discloses that the State of Oklahoma levies a premium tax on foreign life insurance companies, similar to the tax questioned in the case at bar, imposed by the State Constitution, and the legislature increased the tax to four per cent. The plaintiff in the action was an Indiana corporation and resisted payment upon the ground that the assessment was discriminatory, because not applicable to domestic insurance companies, and is,

therefore, violative of the Fourteenth Amendment. The Court made short shrift of the contention and upheld the tax. Question was there also raised concerning a point not involved in the instant contest, to wit, that the plaintiff company was admitted to do business in the state before the statutory increase of the tax, which was, therefore, not legally applicable to it. (Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. ed. 372, 49 A. L. R. 713.) The Court also overruled this contention, [fol. 36] upon facts similar to those of our case. But, as already stated, that point is not made in the present proceeding. It appears that the position was not taken in that case that the plaintiff was engaged in interstate commerce, and the question was not discussed, but the case was decided long after the decision in the Southeastern Underwriters Ass'n case, *and also after passage of the McCarran Act.*

Also decided after the Southeastern Underwriters Ass'n case, but apparently before the McCarran Act, was First Nat. Ben. Soc. vs. Garrison, 58 Fed. Supp. 972, in which the plaintiff, an Arizona company, challenged the validity of the California statute regulating the conduct of the insurance business in that state. Taxation was not involved but the lengthy opinion is enlightening upon the subject of the status of the law after the adjudication by the Supreme Court (in the Southeastern Underwriters case) that insurance is commerce, interstate where it crosses state lines, and in the absence of Congressional legislation. State regulation was upheld.

One of the postulates set forth in the Garrison decision, number two, is as follows: "It is a well established principle that Congress may circumscribe its regulation of interstate commerce and occupy a limited field * * *." (It is very clear to us that Congress has expressly circumscribed its regulation of the interstate business of insurance by the enactment of the provisions of the McCarran Act.) Cited with approval was another of the utterances of the Chief Justice in his dissenting opinion in the Southeastern Underwriters case (not at all, however, in conflict with the leading opinion) to the effect that the judgment of the Court in the latter case nowhere gave the slightest intimation that all state laws governing insurance companies were rendered *ipso facto* void but that such matters would have to be decided by a case-to-case determination with consideration of all the respective relevant facts and circum-

stances; and the California District Court concluded (and this was before the McCarran Act) that it is conceivable that as Congress legislates on insurance, state laws will fall, but only to the extent that they are supplemented (supplanted?) by Federal legislation, and that in the meantime state statutes will continue to control. There were further copius quotations from the opinion of Mr. Chief Justice Stone, with which this opinion need not be extended.

Upon the factual consideration aforementioned and the legal grounds stated, the petition is dismissed, the rule discharged, the temporary restraining order (heretofore issued) dissolved and permanent injunction denied.

D. Gordon Baker, C. J.; E. L. Fishburne, A. J.; T. H. Stukes, A. J.; C. A. Taylor, A. J.; G. Dewey Oxner, A. J.

[fol. 37] In the Supreme Court of South Carolina

[Title omitted]

Petition for Rehearing—Filed September 24, 1945

Your Petitioner, The Prudential Insurance Company of America, respectfully presents this Petition to The Honorable The Chief Justice and the Associate Justices of the Supreme Court of South Carolina:

That on the 13th day of September, 1945, this Honorable Court filed a *Per Curiam* Opinion denying the relief sought by your Petitioner, discharging the Rule issued, dissolving the temporary Order issued in connection therewith, and denying the permanent injunction sought; and your Petitioner, deeming that this Court in its Opinion has overlooked and misapprehended certain material matters involved, respectfully asks for a rehearing on the grounds hereinafter set forth.

The Court finds that the taxation complained of does not discriminate against your Petitioner, a foreign insurance company engaged in interstate commerce, in favor of domestic insurance companies engaged in intrastate commerce. The Opinion, on page 3, (Westbrook's Adv. Sheets 15 Sept., 1945, p. 16), says:

> "Statistics are included in the petition and uncontested by the return which show the amount of the premiums

tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies."

[fol. 38]

I:

The Court misapprehends the Facts of the Record in the Finding Upon Which it Bases its Conclusion That Sections 7948, 7949, South Carolina Code of Laws 1942, do not Discriminate Against the Petitioner, a Foreign Corporation Engaged in Interstate Commerce, in Favor of Domestic Insurance Companies, Because the Latter Pay Equivalent Taxes on Property Not Paid by Petitioner, Since Exhibit A of the Petition Shows That as to Personal Property Taxes the Petitioner Pays These in Substantial Amount, and of Course Upon the Same Basis as Such Taxes are Paid by Domestic Insurance Companies or any Other Owner Within the State of South Carolina.

Without argument, of course, and merely to amplify the factual features which cannot be comprised in detail within the composite statement of the above ground, we respectfully point out:

(a) It will be noted that Column 5 in Exhibit A of the Petition shows "*all other State or local taxes paid in 1944*" with a footnote to the effect that the only exception to the figures presented is that "they do not include real estate taxes. Hence, the taxes shown in Column 5 include, contrary to the statement in the Opinion, all personal property taxes paid by the domestic companies covering, of course, taxes on "furniture, equipment, personal property investments, etc." In addition, the figures as to domestic companies include social security taxes paid to the Federal government and taxes paid in other states in which the respective companies may be doing business.

[fol. 39] (b) It will be noted that after setting forth the items of personal property on which the Court finds

that domestic companies are paying taxes, the sentence concludes: (These are) "taxes of a nature which petitioner pays none here which correspond." Column 5 shows the item of $3103.92 paid by this petitioner on account of "all other state and local taxes paid in 1944." These taxes are of the same nature as those paid by the South Carolina companies, except that in the Prudential's instance there is no inclusion of social security taxes and taxes paid in other states. These taxes paid in South Carolina by the Prudential are comparable in amount with similar "other state and local taxes" paid by the domestic companies, being smaller than the amounts paid by three and greater than the amounts paid by two of the South Carolina companies listed. It will be observed that the figures in Column 5 vary roughly in proportion to the amount of business written by the respective companies within the state.

II

The Court's Finding of Fact That the Record Contains no Showing of Taxes Paid by Domestic Companies "on Their Home Office Buildings" is Correct, Since no Real Estate Taxes are Included. But, we Respectfully Submit, the Court is in Error in Considering Real and Personal Property Taxes Assessed Against Domestic Companies as of the Same Nature, or as Equivalent to the Premium Taxes Assessed Against Petitioner as a Foreign Insurance Company for the Privilege of Conducting its Interstate Business in South Carolina, so as to Equalize or Remove the [fol. 40] *Discrimination That Might Otherwise Obtain in the Enforcement of the Statutes Complained of*—because:

(a) The petitioner is subject to the same personal and real property taxes as the domestic companies;

(b) The petitioner, *as shown*, actually pays substantial personal property taxes;

(c) The nature of property taxes is dissimilar and not comparable to license or privilege taxes levied by the state as a condition to the right of doing business therein;

(d) Property taxes are levied and collected by County and lesser governmental units; whereas premium taxes are levied by and payable to the State.

(c) *Ad valorem* taxes on tangible property are imposed in consideration of the benefits and protection accorded the owner by the governmental unit where the property is located, whereas a privilege tax is imposed by the Sovereign State on the right to do business.

III

The Court in Considering and Determining the Existence of Corresponding or Equivalent Taxation has Injected Into This Cause an Issue That in Nowise is Warranted by the Record—because

(a) In paragraph 12 of the Petition referring to the taxes in question it is alleged: "* * * there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of." This is admitted by Respondent's demurrer and is not denied by his Reply (See Respondent's Demurrer, etc., Fourth Section, pp. 5, 6); and

(b) No evidence to sustain such issue and no argu- [fol. 41] ment relating to same has been offered by Respondent.

IV

The Court has Taken Into Consideration the Taxes Paid by Domestic Insurance Companies on "Home Office Buildings" as an Element in its Finding That Domestic Companies Pay Property Taxes Equivalent to the Premium Taxes Assessed Against Your Petitioner. We submit that it overlooks and misapprehends the following in so doing:

(a) The ownership of a home office building or of any real property is not a necessary concomitant of an insurance business;

(b) There is no evidence of any real estate ownership in the Record;

(c) There is no evidence of any kind as to what domestic insurance companies pay in real property taxes.

V

We respectfully submit, that since *the Court has Considered the Payment of Real Property Taxes by Domestic Companies as an Element to Establish the Defense of Equivalent Taxation Against the Petitioner's Charge That the Premium Taxes Imposed Upon it Constitute a Discrim-*

inatory Burden on its Interstate Business, it Should Consider What These Taxes Amount to.

From the official records of the Insurance Commissioner of the State of South Carolina, we submit the following returns as to real estate taxes paid for the year 1944 by the domestic companies listed in Exhibit A to the Petition:

[fol. 41-a] Liberty Life Insurance Co.	$4151.02
Carolina Life Ins. Co.	6486.92
Atlantic Coast Life Ins. Co.	6506.49
Palmetto State Life Ins. Co.	3258.11
Capitol Life & Health Ins. Co.	1162.23

We submit a showing from Exhibit A, with real property taxes included:

Name of Insurance Company	*Column 1* 1943 South Carolina Premiums Column 1 Schedule T Life and Casualty	*Column 7* Total Shown	Real Estate Taxes Paid For the Year 1944	Grand Total
Liberty Life	$5,339,320.20	$13,178.40	$4,151.02	$17,329.42
Carolina Life	1,748,356.86	12,171.75	6,486.92	18,658.67
Atlantic Coast Life	937,055.99	1,618.35	6,506.49	8,124.84
Palmetto State Life	931,768.12	5,960.30	3,258.11	9,218.41
Capitol Life and Health	500,761.13	2,975.18	1,162.23	4,137.41
Prudential Ins. Co. of America	858,915.82	22,780.86	—0—	22,780.86

The Prudential Insurance Company of America, with a premium collection in South Carolina of $858,915.82 (Column 1) paid in *premium taxes alone* $19,676.94. The disparity between the taxes paid by Petitioner and those paid by domestic companies becomes impressive when the item of premium collection of the respective companies is compared.

[fol. 42] For the convenience of the Court we present the following statement of percentages:

Name of Insurance Co.	Percentage Taxes per Column 7 of Exhibit A *plus* Real Estate Taxes as Related to Premium Collections Column 1, Exhibit A	Percentage Taxes per Column 7 of Exhibit A as Related to Premium Collections Column 1, Exhibit A
Liberty Life	.28	.21
Carolina Life	.92	.60
Atlantic Coast Life	.69	.14
Palmetto State Life	.87	.56
Capitol Life and Health	.53	.38
Prudential Ins. Co.	....	2.60

In conclusion your Petitioner respectfully submits that this is a cause involving questions of nationwide importance and in support of this position will ask the Honorable Court to grant it a reasonable time in which to file a short Brief of Argument to sustain same; and that it grant a rehearing.

Further, in view of the issue of equivalent taxation, raised for the first time in the Opinion, your Petitioner asks leave of the Court to file in the Record a statement of the real estate taxes paid by the domestic insurance companies listed in Exhibit A, attached to the Petition, as shown by their respective annual returns for the year 1944 filed in the office of the Insurance Commissioner of the State of South Carolina.

Respectfully Submitted, McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., September 24, 1945.

[fol. 43] State of South Carolina,
County of Richland:

I, R. Beverley Herbert hereby certify that I have considered the Petition herein and there is merit in the grounds thereof. I am not concerned in this case.

A. Beverley Herbert.

Columbia, S. C., September 24, 1945.

[fol. 43a] In Supreme Court of South Carolina

Order Denying Petition for Rehearing—Filed October 22, 1945

Upon careful consideration of the within petition we find that none of the matters referred to therein was either overlooked or misapprehended by the Court in the preparation of the judgment heretofore filed; hence the petition is denied.

D. Gordon Baker, C. J.; E. L. Fishburne, A. J.; T. H. Stukes, A. J.; C. A. Taylor, A. J.; G. Dewey Oxner, A. J.

[File endorsement omitted.]

[fol. 44] IN THE SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

NOTICE OF MOTION

To the Honorable John M. Daniel, Attorney General, and The Honorables M. J. Hough and T. C. Callison, Assistant Attorneys General, Attorneys for the Respondent:

You Will Please Take Notice: That on Monday, 8th October, 1945, during the motion hour, the undersigned will move before the Supreme Court for an Order permitting the Petitioner herein to file in the record of this cause a statement of the real estate taxes paid in South Carolina by the domestic insurance companies listed in Exhibit A attached to the Petition herein, said list to be made up of figures taken from the 1944 annual returns of such companies duly filed and of record in the office of the Insurance Commissioner of the State of South Carolina, Respondent herein; reserving the right to you of filing such evidence contradicting this particular statement as may be meet and proper. Copy of Order that will be prayed for, with statement attached, is hereto annexed.

McKay & McKay, Attorneys for Petitioner.

Columbia, S. C., October 1, 1945.

[fol. 45] IN THE SUPREME COURT OF SOUTH CAROLINA

IN THE ORIGINAL JURISDICTION

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

against

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

ORDER

On consideration of the application of the Petitioner herein for leave to file in the record Statement of real estate taxes paid in the State of South Carolina by domestic insurance companies listed in Exhibit A attached to the

Petition herein, as shown by their respective annual returns for 1944, filed in the office of the Insurance Commissioner for the State of South Carolina, said statement being duly certified from the office of the Insurance Commissioner and hereto attached; it is

Ordered that this motion be granted and the statement hereto attached be filed as part of the record in this cause.

Further Ordered that the Respondent herein may file such evidence contradicting this particular statement as may be meet and proper.

[fol. 46] STATEMENT

Of Real Estate Taxes Paid in the State of South Carolina by Domestic Insurance Companies Listed in Exhibit A Attached to the Petition Herein, as Shown by Their Respective Annual Returns for 1944, Filed in the Office of the Insurance Commissioner for the State of South Carolina.

Name of Company	*Real Estate Taxes Paid*
Liberty Life Insurance Co.	$4151.02
Carolina Life Insurance Co.	6486.92
Atlantic Coast Life Ins. Co.	6506.49
Palmetto State Life Ins. Co.	3258.11
Capitol Life & Health Ins. Co.	1162.23

Original Duly Certified.

[fols. 47-48] IN SUPREME COURT OF SOUTH CAROLINA

ORDER REFUSING MOTION

Motion refused.

By order of the Court.

D. Gordon Baker, Chief Justice.

10/8/45.

Due and legal service of the within Notice is hereby acknowledged and copy thereof retained at Columbia, S. C., this 2 day of October, 1945, without prejudice.

John M. Daniel, Attorneys for Respondent.

[fol. 49] IN THE SUPREME COURT OF SOUTH CAROLINA

[Title omitted]

ORDER SUBSTITUTING PARTY RESPONDENT

It being brought to the attention of this Court that D. D. Murphy, since the rendition of final judgment in this cause has been succeeded as Insurance Commissioner of the State of South Carolina by L. George Benjamin, now, on motion of Attorneys for The Prudential Insurance Company of America, a corporation, Appellant, the Attorney General of the State of South Carolina consenting, it is

Ordered that the said L. George Benjamin, as Insurance Commissioner of the State of South Carolina, be substituted in the place of said D. D. Murphy, as Respondent in this cause.

Dated at Florence, S. C. the 19th day of November, 1945.

D. Gordon Baker, Chief Justice of the Supreme Court of South Carolina.

I consent: John M. Daniel, Attorney General of the State of South Carolina.

[fol. 50] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of South Carolina:

The petition of The Prudential Insurance Company of America respectfully represents:

1. Petitioner is a mutual life insurance corporation organized and existing under the laws of the State of New Jersey and is the appellant in the above-entitled cause.

2. On March 29, 1945, the petitioner filed in the Supreme Court of the State of South Carolina, a petition for a rule on D. D. Murphy, as Insurance Commissioner of the State of South Carolina, to show cause why he should not be enjoined and restrained from collecting license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and from revoking or suspending peti-

tioner's certificates of authority for its failure to pay said taxes, and on said date said Court issued the rule to show cause, as prayed for by petitioner.

[fol. 51] 3. The petitioner, after having set forth in said petition, inter alia, the nature of petitioner's insurance business, which was transacted across state lines and, as such, constituted interstate commerce, alleged in said petition that the aforesaid sections were unconstitutional and in violation, inter alia, of Article I, Section 8, Clause 3 of the Constitution of the United States, since they applied only to foreign insurance corporations while domestic insurance corporations were exempt therefrom and not subjected to any correlative or corresponding tax.

4. In accordance with said rule to show cause the petitioner deposited with the Clerk of said Court its certified check in the amount of $14,994.01 (representing the amount of taxes involved), to be held pending the determination of said cause. Subsequently the petitioner deposited with said Clerk a second certified check in the amount of $5,942.68 for the same purpose, thus increasing its total deposit as aforesaid to the sum of $20,936.69.

5. The respondent, D. D. Murphy, as Insurance Commissioner of the State of South Carolina, filed a demurrer to said petition and a return to rule to show cause and reply to petition in which, inter alia, he pleaded Public Law No. 15 (known as the Mc-Carran-Ferguson Act) as a further defense. On the basis of said pleadings, the case was submitted to the Court for its determination.

6. On September 13, 1945, the Supreme Court of the [fol. 52] State of South Carolina filed its opinion in which it upheld the constitutionality of said statutes, dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore issued, and denied a permanent injunction and on said date entered judgment in favor of the respondent as set forth in its opinion.

7. On September 24, 1945, and within the time allowed therefor, a petition for rehearing was filed by the petitioner.

8. On October 22, 1945, said petition for rehearing was denied by the Supreme Court of the State of South Carolina.

9. Subsequent to the rendition of said final judgment D. D. Murphy was succeeded as Insurance Commissioner

of the State of South Carolina by L. George Benjamin, and on November 19, 1945, on motion of attorneys for petitioner, consented to by the Attorney General of the State of South Carolina, the Supreme Court of the State of South Carolina entered an order substituting said L. George Benjamin as Insurance Commissioner of the State of South Carolina in place of D. D. Murphy as respondent in this cause.

10. The Supreme Court of the State of South Carolina is the highest court of the State of South Carolina in which a decision herein can be had.

11. In this cause there is drawn in question the validity of statutes of the State of South Carolina on the ground that said statutes, as here applied, are repugnant to the Constitution and laws of the United States, and the decision is in favor of their validity, notwithstanding your petitioner's contention that said statutes violate Article I, Section 8, Clause 3 of the Constitution of the United States.

[fol. 53] 12. Therefore, in accordance with § 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under § 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignment of Errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is also filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the said Supreme Court of the State of South Carolina, the highest court of the said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the judgment of the said Supreme Court of the State of South Carolina, entered on

the 13th day of September, 1945 and made final on the 22nd day of October, 1945, by the entry of an order by that Court denying the petitioner's petition for rehearing, may be examined and reversed, and also prays that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of South Carolina, under his hand and seal of the [fol. 54] said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Dated: November 30, 1945.

Joseph — Henderson, Douglas McKay, Attorneys for Petitioner.

[fol. 55] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The Prudential Insurance Company of America, appellant in the above-entitled cause, assigns the following errors in the record of proceedings in this case:

1. The Supreme Court of the State of South Carolina erred in failing to hold specifically that the insurance business of petitioner conducted in the manner and to the extent established in this proceeding constituted interstate commerce within the meaning of Article I, Section 8, Clause 3 of the Constitution of the United States, as heretofore determined in the case of *United States v. Southeastern Underwriters Association*, 322 U. S. 533.

2. The Supreme Court of South Carolina erred in holding that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942 (which imposed taxes on the petitioner, a foreign insurance corporation, in the aggregate amount of three (3%) per cent of the insurance premiums received from petitioner's insurance business in South Carolina during the preceding year—less minor reductions in the [fol. 56] event of certain contingencies, the payment of which is a condition precedent to petitioner obtaining a certificate of authority to transact its insurance business in

South Carolina) did not constitute a direct and unreasonable burden upon, interference with, or a regulation of interstate commerce in the conduct of petitioner's business in violation of its right under Article I, Section 8, Clause 3 of the Constitution of the United States.

3. The Supreme Court of the State of South Carolina erred in holding that Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, did not illegally and unjustly discriminate against interstate commerce of foreign insurance companies and in favor of local commerce of South Carolina domestic insurance companies so as to violate Article I, Section 8, Clause 3 of the Constitution of the United States, especially since domestic companies are not subject to any correlative, corresponding, equivalent, or similar tax or taxes.

4. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 8, Clause 3 of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate [fol. 57] commerce in the conduct by the petitioner of its insurance business in the State of South Carolina.

5. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 8, Clause 1 of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to permit, nor could it legally permit, the imposition of unequal excise taxes in the several states.

6. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and not in violation of Article I, Section 1, of the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-

Ferguson Act, notwithstanding the fact that said Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation by the several states of interstate commerce in the conduct by the petitioner of its insurance business in the State of South Carolina.

7. The Supreme Court of the State of South Carolina erred in holding that the aforesaid Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, were valid and [fol. 58] not in violation of Fifth Amendment to the Constitution of the United States by virtue of Public Law No. 15, 79th Congress, Chapter 20, 1st Session, known as McCarran-Ferguson Act, notwithstanding the fact that the said Act was not intended to deprive the petitioner of its property without due process of law.

8. The Supreme Court of the State of South Carolina erred in stating in its opinion (a) that said premium tax is "neither a burden upon interstate commerce nor discriminatory against a foreign company", and (b) that "upon the showing made" (namely, statistics in the petition and uncontested by the return which "do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond") "there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the laws of this state, to which it is subject in the conduct of its business here" since said statements are contrary to and unsupported by the undisputed evidence and injected an issue in the case that was not warranted by the record and further, since not only are ad valorem property taxes paid by domestic companies neither corresponding nor correlative taxes but also, even if said property taxes be considered corresponding or cor- [fol. 59] relative taxes, there was no evidence that the amount of property taxes paid by domestic companies was sufficient to offset the discrimination of "premium taxes."

9. The Supreme Court of the State of South Carolina erred in refusing petitioner's motion for an order permitting petitioner to file in the record of this case (pending determination of its petition for rehearing) a statement of real estate taxes paid in South Carolina by domestic in-

surance companies, since said Court in its opinion had injected the issue of real estate taxes paid by domestic insurance companies.

10. The Supreme Court of the State of South Carolina erred in dismissing the petitioner's petition for injunction and equitable relief, in discharging the rule to show cause and dissolving the temporary restraining order which had heretofore been issued, and in denying a permanent injunction under which the Insurance Commissioner of the State of South Carolina would be enjoined and restrained perpetually from collecting the license fees provided for in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, and also enjoined and restrained from revoking or suspending petitioner's certificates of authority for failure to pay such taxes since said statutes are in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and in entering judgment against the petitioner and in favor of the defendant.

[fol. 60] Wherefore, on account of the errors hereinbefore assigned, appellant prays that said judgment of the Supreme Court of the State of South Carolina, entered in the above cause on September 13, 1945, and made final on October 22, 1945, by an order denying petition for rehearing, be reversed and entered in favor of appellant.

The Prudential Insurance Company of America; Joseph W. Henderson, 1910 Packard Building, Philadelphia 2, Pa.; Douglas McKay, Carolina Life Building, Columbia, South Carolina.

[fol. 61] In the Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of The Prudential Insurance Company of America, the appellant in the above-entitled cause, for an appeal in the above case to the Supreme Court of the United States from a judgment of the Supreme Court of the State of South Carolina entered on September 13, 1945, and made final October 22, 1945, by an order denying petition for rehearing, having been filed with the Clerk of this Court and presented herein, accompanied by Assignment of Errors

and prayer for reversal, and Statement as to Jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby Allowed to the Supreme Court of the United States from the judgment of the Supreme Court of the State of South Carolina entered on September 13, 1945 and made final on October 22, 1945, by an order denying petition for rehearing, as [fol. 62] prayed for in said petition, and that the Clerk of the Supreme Court of the State of South Carolina shall, within forty (40) days of this date, make and transmit to the Supreme Court of the United States under his hand and the seal of said Court a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond in the sum of $1,000.00 that said appellant shall prosecute said appeal to effect and answer all costs if he failed to make his plea good.

Dated: November 30, 1945.

D. Gordon Baker, Chief Justice of the Supreme Court of the State of South Carolina.

[fol. 63] Citation in usual form showing service on John M. Daniel omitted in printing.

[fol. 64] Bond on appeal for $1,000.00 approved and filed. Omitted in printing.

[fol. 65] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE INDICATING PORTIONS OF RECORD TO BE INCORPORATED INTO THE TRANSCRIPT

To the Clerk of the Supreme Court of the State of South Carolina:

In conjunction with appellant's appeal to the Supreme Court of the United States in the above-entitled cause, in which Order Allowing Appeal was issued the 30th day of

November, 1945, and on the same day filed with you, you are hereby requested to prepare, certify and transmit as part of the transcript to Clerk of the Supreme Court of the United States, in accordance with the requirements of statute and of the rules of that Court, the following:

1. Petition for injunction and equitable relief and Exhibit "A" thereto;
2. Rule to show cause;
3. Acknowledgement of service of petition and rule to show cause;
4. Demurrer;
5. Return to rule to show cause and reply to petition;
[fol. 66] 6. Opinion of Supreme Court of the State of South Carolina, filed September 13, 1945;
7. Judgment of the Supreme Court of the State of South Carolina entered in accordance with the aforesaid opinion;
8. Petition for rehearing filed September 24, 1945;
9. Notice by attorneys for petitioner dated October 1, 1945, of intention to present motion and order permitting petitioner to file statement concerning real estate taxes, and order submitted therewith, together with acknowledgement of service thereof;
10. Order of the Supreme Court of the State of South Carolina dated October 8, 1945, refusing motion to file statement concerning real estate taxes;
11. Order of the Supreme Court of the State of South Carolina dated October 22, 1945, denying petition for rehearing;
12. Order of the Supreme Court of the State of South Carolina, dated November 19, 1945, substituting L. George Benjamin, as Insurance Commissioner, as respondent in place of D. D. Murphy;
13. Petition for appeal to the Supreme Court of the United States;
14. Assignment of errors;
15. Statement as to jurisdiction;
16. Order allowing appeal;
17. Citation and service thereof;
[fol. 67] 18. Cost bond;
19. Proof of service on appellee of;
    (a) Copy of petition for appeal;
    (b) Copy of order allowing appeal;
    (c) Copy of assignment of errors;

(d) Copy of statement as to jurisdiction;

(e) Statement directing attention of the appellee to third paragraph of Rule 12 of Rules of the Supreme Court of the United States;

20. Praecipe for transcript of record; and
21. Clerk's certificate as to transcript of record.

Dated: November 30th, 1945.

Joseph W. Henderson, 1910 Packard Building, Philadelphia 2, Pa. Douglas McKay, Carolina Life Building, Columbia, South Carolina.

Service of the foregoing praecipe is hereby acknowledged this 30th day of November, 1945.

John M. Daniel, Atty. Gen. of the State of South Carolina and Atty. for Appellee.

[fol. 68] IN THE SUPREME COURT OF SOUTH CAROLINA

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina, Respondent

CERTIFICATE

I, J. B. Westbrook, Clerk of the Supreme Court of South Carolina, do hereby certify that the foregoing papers, consisting of petition for injunction and equitable relief; rule to show cause; demurrer return to rule to show cause and reply to petition; the opinion of the Supreme Court of South Carolina; and bond, are true and correct copies thereof. The opinion of the Supreme Court of South Carolina is the final judgment of the Court. The original citation with acceptance of service endorsed thereon, is herewith transmitted; the other papers attached hereto being copies of the papers set out in the praecipe, a copy of which is hereto attached.

This is the entire record in the above entitled case.

J. B. Westbrook, Clerk. (Seal.)

Columbia, South Carolina, December 6, 1945.

[fol. 69] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED—Filed December 31, 1945.

Comes now the appellant and adopts its Assignment of Errors as its Statement of Points to be relief upon and represents that the whole record, as filed, is necessary for the consideration of the case.

Dated the 31st day of December, 1945.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania; Douglas McKay, Carolina Life Building, Columbia, South Carolina, Attorneys for Appellant.

[fol. 69a] [File endorsement omitted.]

[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 28, 1946.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Jackson and Mr. Justice Rutledge took no part in the consideration of this question.

Endorsed on Cover: File No. 50,410 South Carolina, Supreme Court, Term No. 707. The Prudential Insurance Company, Appellant, vs. L. George Benjamin, as Insurance Commissioner of the State of South Carolina. Filed December 31, 1945. Term No. 707 O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 31 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

L. GEORGE BENJAMIN, As Insurance Commissioner of the State of South Carolina.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION

Joseph W. Henderson,
Douglas McKay,
Counsel for Appellant.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statement of the case	2
Basis of jurisdiction	3
State statutes involved	3
Dates of the judgment sought to be reviewed and of application for appeal	4
Finality of judgment	4
Statement showing that the nature of the case and of the rulings of the court were such as to bring the case within the jurisdictional provisions relied upon	5
Specification of the stages in the proceedings and the manner in which the federal question sought to be reviewed were raised	6
Statement of the grounds upon which it is contended that the questions involved are substantial	7
Cases believed to sustain jurisdiction	12
Appendix "A"—Opinion of the Supreme Court of South Carolina	14
Appendix "B"—Applicable South Carolina statutes	26

Table of Cases Cited

Baldwin v. *G. A. F. Seeling, Inc.*, 294 U. S. 511	12
Citizens Bank of Michigan City, Indiana, v. *Offerman*, 249 U. S. 448	4
Crutcher v. *Commonwealth of Kentucky*, 141 U. S. 47	12
Fisher's Blend Station, Inc. v. *Tax Commission*, 297 U. S. 650	12
Gorham Manufacturing Co. v. *Wendell*, 261 U. S. 1	3
Hale v. *Bimco Trading, Inc.*, 306 U. S. 375	12
Henneford v. *Silas Mason*, 300 U. S. 577	12
Hinson v. *Lott*, 8 Wall. 148	12
Lincoln National Life Ins. Co. v. *Read*, 89 L. Ed. 1250	7

Page

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 12

Prudential Insurance Co. v. *Benjamin*, 35 S. E. (2d) 586 2, 17

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90 12

Robbins v. *Shelby Taxing District*, 120 U. S. 489 13

Scott v. *Donald*, 165 U. S. 58 13

U. S. v. *Southeastern Underwriters's Association*, 322 U. S. 533 2, 5, 8, 12

Welton v. *Missouri*, 91 U. S. 275 12, 13

STATUTES CITED

Code of Laws of South Carolina, 1942, Sections 7948 and 7949 (Volume 4, Chapter 157, Article 1, pp. 594-596) 3, 4, 5, 8

Constitution of the State of South Carolina, Article V:

Section 1 4

Section 4 4

Constitution of the United States:

Aricle I, Section 8, Cl. 3 2, 5, 6

14th Amendment 6

Code of Laws of South Carolina, 1942, Sections 408 and 409 (Volume 1, Title 5, Chapter 14, pp. 250-252) 3

Judicial Code, Section 237 (28 U. S. C. 344), as amended by the Act of January 31, 1928, C. 14, sec. 1; 45 Stat. 54 (28 U. S. C. 861a) 3

Public Law No. 15, 79th Congress (Chapter 20, 1st Session) 6, 10, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Appellant,

vs.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

APPEAL FROM SUPREME COURT OF THE STATE OF SOUTH CAROLINA, ITS NO. 2628.

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Supreme Court of the United States, The Prudential Insurance Company of America, appellant herein, files this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from a final judgment of the Supreme Court of the State of South Carolina in the cause of The Prudential Insurance Company of America v. D. D. Murphy,

as Insurance Commissioner of the State of South Carolina, No. 2628.

The appellant, a foreign insurance corporation, relying on the recent case of *United States* v. *Southeastern Underwriter's Association*, 322 U. S. 533, in which insurance business such as transacted by appellant herein was held to be interstate commerce, had requested the Insurance Commissioner of the State of South Carolina to issue to it a certificate of authority to do its business in said State during the forthcoming insurance year of 1945-1946 without the payment by appellant of South Carolina taxes based on a percentage of the insurance premiums received from appellant's insurance business in South Carolina during the preceding year, on the ground that the laws which impose said taxes, which were not imposed on domestic insurance companies, were unconstitutional since they violated Article I, Section 8, Clause 3 of the Constitution of the United States. The Insurance Commissioner, however, demanded the payment of said taxes. The appellant then filed its petition for injunction and equitable relief and obtained a rule on the Insurance Commissioner to show cause why he should not be enjoined and restrained from collecting said taxes and from revoking or suspending appellant's certificates of authority for its failure to pay said taxes. After a demurrer and a return to said rule and reply to said petition had been filed, argument was presented to the Supreme Court of the State of South Carolina, which Court in a per curiam opinion dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore issued, and denied a permanent injunction. A copy of the opinion, which is reported in — S. C., 35 S. E. (2d) 586, is appended hereto as Appendix "A". Subsequently L. George Benjamin, who in the meantime had succeeded D. D. Murphy as Insurance Commissioner, was

substituted in his official capacity of Insurance Commissioner in place of said D. D. Murphy as respondent, in said cause. Said substitution, which was made by appropriate order of the Supreme Court of the State of South Carolina, was permitted under the laws of the State of South Carolina, Sections 408 and 409 of the Code of Laws of South Carolina, 1942, (Volume I, Title 5, Chapter 14, pp. 250-252). See *Gorham Manufacturing Company* v. *Wendell*, 261 U. S. 1 (1922).

Basis of Jurisdiction

Section 237 of the Judicial Code (28 U. S. C. A. §344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court of the United States by writ of error. By Act of January 31, 1928, C. 14 §1; 45 Stat. 54 (28 U. S. C. A. §861a) the remedy by appeal has been substituted for writ of error in such cases.

The State Statutes Involved

The statutes of the State of South Carolina, the validity of which are involved, are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, (Volume 4, Chapter 157, Article 1, pp. 594-596). Said statutes provided, inter alia, that each foreign insurance corporation must annually pay taxes in the aggregate amount of three (3%) per cent of the premiums received from its insurance business in South Carolina during the preceding year, less minor reductions in the event of certain contingencies, and that domestic insurance corporations are exempt from said taxes.

Said Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are appended hereto as Appendix "B".

The Date of the Judgment Sought to Be Reviewed and Date upon Which the Application for Appeal Is Presented.

The date of the final decision and judgment in the Supreme Court of the State of South Carolina is October 22, 1945.

The original judgment and decision of the Supreme Court of the State of South Carolina was rendered on September 13, 1945. Thereafter, and in apt time, The Prudential Insurance Company of America, appellant herein, filed a petition for rehearing with the Supreme Court of the State of South Carolina, and said petition for rehearing was denied by said Court on October 22, 1945.

The application for appeal, in support of which this statement is made, was presented on November 30th, 1945.

Finality of Judgment

The Supreme Court of the State of South Carolina is the highest Court in the State of South Carolina, and on its denial of the petition for rehearing its judgment became final. Article V, Sections 1 and 4, Constitution of State of South Carolina.

The Supreme Court of the United States has held that the date from which the time for making application for appeal begins to run is the date, if a petition for rehearing is filed, when the petition for rehearing is denied. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. 448, 449.

Statement Showing That the Nature of the Case and of the Rulings of the Court Were Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

The appellant is a foreign insurance corporation which is doing an insurance business in all forty-eight states of the United States and elsewhere and which has been authorized to transact business in the State of South Carolina since 1897. Notwithstanding the recent decision in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533, in which the business of insurance as transacted herein by the appellant was held to be interstate commerce, demand was made upon appellant for the payment of 1945 taxes based on three (3%) per cent of the premiums which it received from its insurance business in South Carolina during the preceding year, less minor deductions, as provided in Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942. Petitioner further was advised that unless said taxes were paid, petitioner would be denied a certificate of authority to do insurance business in said state.

Petitioner then filed a petition for injunction and equitable relief in the Supreme Court of the State of South Carolina alleging, inter alia, that said statutes were unconstitutional in that they violated Article I, Section 8, Clause 3 of the Constitution of the United States as said taxes were a burden upon, interference with, and regulation of interstate commerce and also an illegal and unjust discrimination against foreign insurance companies, such as appellant, which were engaged in interstate commerce, and in favor of South Carolina domestic insurance companies which are not subject to said taxes or to any correlative or corresponding tax. The respondent filed a demurrer to said petition and a return to the rule to show cause and reply to said petition with the result that the said Court was only required to decide the question of law involved in this proceeding,

namely, are the aforesaid tax statutes repugnant to the Constitution of the United States.

The Supreme Court of the State of South Carolina decided in favor of the validity of said statutes and dismissed appellant's petition for injunction and equitable relief.

Specification of the Stages in the Proceedings and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The federal questions sought to be reviewed were raised by the appellant at the very inception of the proceedings and at every appropriate time thereafter.

In appellant's petition for injunction and equitable relief it was specifically alleged in paragraph 9 that the business of the appellant is and has been interstate commerce and in paragraphs 12 and second prayer of said petition that said statutes under which said "premium taxes" are imposed are in violation of Article I, Section 8, Clause 3 of and Fourteenth Amendment to the Constitution of the United States, as more fully developed in said petition.

The respondent joined issue on the federal question of the constitutionality of said tax statutes and in said demurrer pleaded in support thereof Public Law No. 15, 79th Congress (Chapter 20, 1st Session) known as the McCarran-Ferguson Act which provided, inter alia, that "the business of insurance * * * shall be subject to the laws of the several states which relate to the regulation or taxation of such business."

In respondent's return to the rule to show cause and reply to petition, the respondent in the second paragraph denied that the conduct of appellants' business constituted interstate commerce; in the fourth and fifth paragraphs denied that there is any illegal discrimination against appellant; and in the fourth paragraph not only denied any illegal discrimination but also denied that the taxes create

a burden upon interstate commerce, and, in addition, alleged therein that said tax statutes are valid by reason of the aforesaid McCarran-Ferguson Act.

The federal question concerning the constitutionality of Public Law No. 15 was immediately raised by the appellant in its brief and argument in which it took the position that, if interpreted as contended for by the respondent, Public Law No. 15 would be unconstitutional.

All the federal questions thus raised were fully argued in petitioner's (appellant herein) Brief and Reply Brief (Petitioner's Brief, pp. 1, 12-65; Petitioner's Reply Brief, pp. 1-9) and in Respondent's (Appellee herein) Brief, pp. 5-20, 22-24).

In its opinion dismissing appellant's petition for injunction and equitable relief, the Supreme Court, which failed to hold specifically that the insurance business of the appellant, conducted in the manner and extent established in this proceeding, was interstate commerce within the meaning of the "commerce clause" expressly held that the statutes which imposed said "premium taxes" were constitutional and not in violation of the commerce clause. (See opinion attached hereto as Appendix "A"; — S. C. —, 35 S. E. (2d) 586.)

The issue of unconstitutionality of said state statutes was again raised in appellant's petition for rehearing, which petition was denied by said Court.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

This appeal presents to the Court a most important constitutional question which directly affects the business of insurance throughout the United States, and which, although recognized in the recent case of *Lincoln National Life Insurance Company* v. *Read*, — U. S. —, 89 L. Ed. 1250

(1945), has not heretofore been decided by the Supreme Court of the United States.

Prior to 1944 numerous states, including South Carolina, had enacted statutes imposing a tax on foreign insurance companies based on a percentage of the premiums received therein during the preceding year without subjecting domestic insurance companies to the same tax or a corresponding or correlative tax.

The decision in *United States* v. *Southeastern Underwriters Association*, 322 U. S. 533 (1944) holding that an insurance company which conducts a substantial part of its business across state lines is engaged in interstate commerce and subject to regulation by Congress under the "commerce clause", immediately raised the grave and important question as to the constitutionality of said discriminatory "premium tax" statutes including the statutes involved herein, i. e., Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942.

The insurance companies in general, such as the appellant, which transacts its business in all forty-eight states, and mostly across state lines, have in the past, prior to the case of *United States* v. *Southeastern Underwriters Association, supra*, paid very substantial taxes in states, like South Carolina, whose taxing statutes now place a burden on interstate commerce by not taxing domestic insurance companies on the same basis and thereby unjustly discriminating against foreign insurance companies.

The sum total of appellant's 1945 tax in sixteen states [1]

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[1] Alabama ($54,390.85); Florida ($110,994.78); Illinois ($1,127,714.07); Indiana ($452,357.44); Kansas ($102,660.15); Kentucky ($124,751.13); Michigan ($470,160.35); Mississippi ($9,393.09); Nebraska ($56,986.97); North Dakota ($1,458.36); Ohio ($1,186,159.22); Oklahoma ($109,624.89); Pennsylvania ($1,881,670.73); South Carolina ($19,676.94); Texas ($32,306.80); and Wisconsin ($332,049.51). The amounts appearing after the names of each state represent the 1945 *tax* on premiums received by the appellant during the preceding year.

whose taxes place a burden on interstate commerce (exclusive of the other thirty-two states where the tax is either questionable or nondiscriminatory) amounts to $6,072,355.28.

As practically all other insurance companies transact business in states other than that in which incorporated and are consequently subject to similar discriminatory taxes, which appellant estimates amounts to approximately $32,900,000.00 per year in the said sixteen states, it is evident that from a monetary point of view alone the questions raised herein are not only substantial but vitally affect the entire insurance business in the United States, as well as the fiscal operations of the respective states.

Furthermore, the questions involved herein require a final adjudication by the Supreme Court of the United States. Numerous cases in various states are pending in which the constitutionality of similar "premium tax" statutes is being litigated not only by the appellant but also by many other insurance companies. A decision in this case, therefore, would greatly assist in deciding similar questions in such other cases if, in fact, it would not control them.

It is most important to the appellant and all insurance companies that, if possible, a final decision be rendered on these questions prior to the time in 1946 when they will be required to engage in additional litigation contesting the validity of 1946 premium taxes.

The questions raised herein are of the greatest importance.

Is the insurance business of the appellant [2] which radiates and is conducted from its Home Office at Newark, New Jer-

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[2] On December 31, 1944, the Company had in force 33,933,077 policies insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075.00; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000.00 on such lives. During the year 1944 the

sey, with all its "interrelationship, interdependence and integration of activities in all the states" interstate commerce?

Is not the "premium tax" imposed upon appellant by the State of South Carolina a direct and unreasonable burden upon, interference with, and regulation of interstate commerce and a violation of the "commerce clause" of the Constitution of the United States as interpreted by numerous decisions of the Supreme Court of the United States?

Is not said "premium tax" an illegal discrimination against the appellant, a foreign insurance corporation, engaged in interstate commerce and in favor of domestic insurance corporations which are not subject to any corresponding, correlative, equivalent or similar tax or taxes?

What was the intent of Congress in enacting Public Law No. 15, 79th Congress, Chapter 20, 1st Session (known as the McCarran-Ferguson Act)? What effect, if any, was it intended to have on existing state discriminatory "premium taxes" and to what extent was Congress constitutionally able to so legislate? Certainly Congress has no authority to levy a tax in a particular state for the benefit of that

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Company issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022.00 and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000.00 on such lives. During the year 1944 the Company collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45. While applications for insurance policies, policy loans, etc., are received by agents operating in the various states, all applications and reports are transmitted to the Home Office in Newark, New Jersey, where they are considered and acted upon and where all contracts are executed and issued. Furthermore, investments of the company are controlled by the Board of Directors at Newark, N. J., where the executive office are also located. However, by the use of the channels of interstate commerce (by mail, telegraph, telephone, radio, vehicles of transportation, etc.) the company is able to conduct its insurance business throughout the United States. For details and the extent of appellant's business, see paragraphs 4 to 9, inclusive, of appellant's Petition for Injunction and Equitable Relief.

state, nor does Congress have authority to adopt as its own a state law which it could not constitutionally enact. Congress has no authority to authorize the State of South Carolina to levy a three (3%) per cent tax on foreign insurance companies, but, if the interpretation placed on Public Law No. 15 by the Supreme Court of the State of South Carolina is permitted to stand, the effect is to delegate to the state authority which Congress itself does not possess.

These momentous questions which have been raised in this case can only be satisfactorily answered by a review by the Supreme Court of the United States and its decision thereon.

Finally, the attention of the Court is directed to the fact that twelve states [3] of twenty-eight states whose "premium tax" statutes as of January 1, 1945, in appellant's opinion placed a burden on interstate commerce have recently enacted legislation which either completely or practically eliminates the aforesaid "premium tax" discrimination, and three states [4] have enacted legislation which purports to eliminate said discrimination but, in the opinion of the appellant, does not actually do so. Thus, it is evident that these various legislatures not only have recognized the importance of those same constitutional questions which are raised herein but by the enactment of new legislation have impliedly acknowledged the unconstitutionality of their respective previous "premium tax" statutes and now in twelve states (see footnote 3, *supra*) do not permit any discrimination in premium taxes between their own domestic and foreign insurance corporations.

State legislatures in some states have voluntarily done what should be required of all state legislatures through

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[3] Arizona, Arkansas, Iowa, Maine, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Washington and West Virginia.

[4] Florida, Oklahoma and Texas.

a decision of the Supreme Court of the United States holding discriminatory "premium tax" statutes, like that of the State of South Carolina, unconstitutional.

Cases Believed to Sustain Jurisdiction.

As to the proposition that appellant's insurance business is interstate commerce:

United States v. *Southeastern Underwriters Association*, 322 U. S. 533 (1944).

As to the proposition that said South Carolina "premium tax" is unconstitutional in that it constitutes a direct and unreasonable burden upon, interference with, and regulation of interstate commerce:

Crutcher v. *Commonwealth of Kentucky*, 141 U. S. 47 (1891);

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90 (1937);

Fisher's Blend Station Inc. v. *Tax Commission*, 297 U. S. 650 (1936);

As to proposition that said South Carolina "premium tax" is unconstitutional in that it illegally discriminates against foreign insurance corporations engaged in interstate commerce and in favor of domestic insurance corporations not subject to said tax or any corresponding or correlative tax:

Welton v. *Missouri*, 91 U. S. 275 (1876);

Baldwin v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935);

Hale v. *Bimco Trading, Inc.*, 306 U. S. 375 (1939);

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, 46, 48 (1940);

Hinson v. *Lott*, 8 Wall. 148 (1868);

Henneford v. *Silas Mason*, 300 U. S. 577 (1937).

As to the proposition that Public Law 15 (McCarran-Ferguson Act) was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate commerce:

Welton v. *Missouri*, 91 U. S. 275 (1876);
Robbins v. *Shelby Taxing District*, 120 U. S. 489 (1887);
Scott v. *Donald*, 165 U. S. 58 (1897).

Conclusion

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

Respectfully submitted,

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APPENDIX "A"

THE STATE OF SOUTH CAROLINA, IN THE SUPREME COURT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Petitioner,

vs.

D. D. MURPHY, as Insurance Commissioner of the State of South Carolina, Respondent

In the Original Jurisdiction

Case No. 2628
Opinion No. 15773
Filed September 13, 1945

PETITION DISMISSED

McKay & McKay, of Columbia, for petitioner.
John M. Daniel, Attorney General, M. J. Hough and T. C. Callison, Assistant Attorneys General, all of Columbia, for respondent.

Per CURIAM:

For a great many years, perforce the decision of the Supreme Court of the United States in Paul vs. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of United States vs. Southeastern Underwriters Ass'n., 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, the latter held that when the insurance business crosses state boundaries, it is interstate commerce. Because of the complexities and colossal nature of this far-flung business, it was feared in many quarters that considerable chaos might result from the departure of the

Southeastern Underwriters decision from the former rule, but for an Act of Congress which was soon thereafter passed.

The latter is known as the McCarran Act, passed February 27, 1945, Public Law, 15, 79th Congress. The portions pertinent to the present controversy are set out below:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.
>
> "Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law."

Unquoted Sections 3 and 4 preserve the applicability of certain provisions of the Sherman Act and the applicability of the National Labor Relations Act, the Fair Labor Standards Act and the Merchant Marine Act.

The Prudential Insurance Company of America is in this State a "foreign" life insurance company, that is, it is in-

corporated under the laws of New Jersey and its home office and the bulk of its property are located in the city of Newark in that State. However, it has solicited business and sold insurance contracts and policies to residents of South Carolina since the year 1897. At the end of 1944 it had in force in this State 26,373 policies insuring the lives of about twenty thousand persons for amounts aggregating over thirty million dollars; and paid claims in that year of $457,602.28 on policies covering the lives of South Carolinians. (In the face of these figures it does not appear that the tax law now resisted was "hostile in conception" or is "burdensome in result",—the words of Mr. Justice Cardozo in Baldwin vs. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032.)

The Company brought this action in the Original Jurisdiction of this Court, by permission, in attack upon the validity of the License tax of three per cent which it has heretofore paid on premiums collected here, under the provisions of the present Sections 7948 and 7949 of the South Carolina Code of Laws of 1942. While the tax is a flat one, as indicated, it is subject to a graduated reduction in proportion to the amount of certain financial investments which the company may make and report in the State of South Carolina.

It is not contended that the latter or any other feature of the law under attack is discriminatory against petitioner as compared with any other member of the class to which it belongs, to wit, "foreign" insurance companies. But it is alleged that this tax which has before been paid without protest by petitioner has become invalid, and therefore unenforceable, by reason of the law declared in the Southeastern Underwriters case, supra, in view of the Federal constitutional authorization of Congress to regulate commerce among the states, and the many decisions of the Federal Courts thereabout. It is also alleged in the petition that the tax violates a section of our State Constitution, but the point was not argued and is, therefore, deemed to have been abandoned in accord with the established rule.

Petitioner presents a two-pronged attack, first that the tax constitutes a burden upon its interstate business, transacted in part within the state, and, second, that it is discriminatory against petitioner for it is not applicable to insurance corporations of the state, domestic companies, which are exempted from the law's provisions. The respondent, the Insurance Commissioner of the State and charged with the enforcement of the law, first contends that the proceeding is really against the State itself, which is immune from suit without its express permission. His demurrer and return also raised the other issues which will be discussed.

Disposition will be first made of the point of the respondent that the action is not maintainable because it is in reality against the State, without its permission, and, therefore, in violation of its sovereign immunity from suit. This is foreclosed by former pronouncements of this Court, in view of the fact that there is no adequate remedy at law, such as payment of the taxes under protest and suit for recovery, if they are illegally assessed. It was said in Santee River Cypress Co. vs. Query, 168 S. C. 112, 167 S. E. 22, as follows: "It is not only within the power of a Court of equity, but the duty rests upon it, to enjoin the collection of an illegal tax in those cases where no adequate legal remedy is provided for the aggrieved taxpayer. Ware Shoals Mfg. Co. vs. Jones, 72 S. C. 211, 58 S. E. 811." The eleventh amendment to the Federal Constitution, attempted to be invoked by respondent, is expressly applicable only to the Courts of that jurisdiction. Federal Land Bank of Columbia vs. State Highway Department, 172 S. C. 174, 173 S. E. 284. State of Missouri vs. Fiske, 290 U. S. 18, 54 S. Ct. 18, 17 L. ed —.

We proceed then to the heart of the controversy. It is the clear intent of Congress to refrain for the present from the regulation and taxation of insurance, even as to the activities of it which undoubtedly constitute interstate commerce under the authority of United States vs. Southeastern Underwriters Ass'n, supra, with the exceptions hereinabove noted.

It would be difficult, if not impossible, to compose clearer statements than are contained in Sections 1 and 2 (a) of the McCarran Act, which are quoted again for emphasis:

> "Section 1. That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a "foreign" company, such as petitioner, had in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies. It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other nonresident insurance companies which may do business there) to which petitioner now objects, but the tax is not at all

uncommon among the states. Annotations, 49 ALR 726, 77 ALR 1490 and 83 ALR 464.

Thus, upon the showing made, there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the tax laws of this state, to which it is subject in the conduct of its business here.

Turning to the gravamen of the complaint, that the tax being upon interstate commerce is *ipso facto* a burden thereon, irrespective of discrimination, we see no reason on the record or in argument to hold that it was not intended to be included by Congress in the "taxation by the several states of the business of insurance", which the McCarran Act declared is in the public interest and directed that the insurance business should continue to be subject thereto.

Congress is authorized by the Constitution of the United States to regulate commerce between the states. The words of that great document are quite plain thereabout, as follows: "The Congress shall have power * * * (3) To regulate commerce with foreign nations, and among several States, and with the Indian tribes." Art. 1, par. 8.

We are unable to see therein any obstacle to the course of Congress in deliberately refraining from regulation of any particular field of interstate commerce, which course is clearly charted by the McCarran Act insofar as regulation by taxation of the insurance business is concerned, unless a necessity for uniformity should require the desistance of the states. We are unable to perceive the latter condition with respect to the taxation of insurance companies. Certainly they have thriven under the existing system of state taxation. The staggering figures in the record in this case, indicating the gigantic size of petitioner's business, prove it.

It is repeated for emphasis and clarity that there is no apparent neces ity for uniformity of the rate of the premium receipts tax of the various states which would invalidate (on that account alone) state legislation upon the subject, which lies in a field deliberately and advisedly unoccupied by Congressional legislative action. Kelly

vs. State of Washington, 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3. It might with equal reason be contended that the property tax assessments and rates should be the same in all states, which we think has never been proposed. See, for lack of a federal question in such a tax (at the time of that decision), Continental Assur. Co. vs. Tennessee, 311 U. S. 5, 61 S. Ct. 1, 85 L. Ed. 5.

There is a very long-standing precedent for the propriety and efficacy of the McCarran Act. It is found in Cooley vs. Port Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996. There one of the major questions was the validity of a law of Pennsylvania fixing pilotage fees (the proceeds of which were applied to the relief of indigent local pilots and their dependents) affecting ocean shipping in interstate commerce. At the first session of Congress it was enacted on Aug. 7, 1789 (1 Stat. at Large 54) that pilots should be under the regulations of the state laws, present and future, until further legislation by Congress. Upon the strength of the latter, the local law was upheld and the Court expressly said that the grant of commercial power to Congress (the commerce clause) does not contain any terms which exclude the states from exercising authority over its subject matter. The principle of this decision is stated in the modern text of American Jurisprudence, Vol. 11, p. 18, as follows: "Strictly speaking, Congress cannot delegate to the states its power over interstate and foreign commerce. However, there the subject is one upon which the states have the power to legislate in the absence of action by Congress, it may validly be provided by Congress that state statutes shall be controlling." And see the approving citation of it in the Minnesota Rate Cases (Simpson vs. Shepard) 230 U. S. 352, 57 L. Ed. 1511, 33 S. Ct. 729, 48 L. R. A. 1151, Ann. Cas. 1916A, 18.

The author of the opinion of the Court in United States vs. Southeastern Underwriters Ass'n, supra, pointed the way to the course thus far followed by Congress when he said:

> "Another reason advanced to support the result of the cases which follow Paul vs. Virginia, has been that, if any aspects of the business of insurance be

treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this Court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that, for Constitutional purposes, certain activities of a business may be interstate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the State and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

From one of the supporting cases cited by the Court for the foregoing, New York Life Ins. Co. vs. Deer Lodge County, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332, the following is quoted:

"There are cognate cases to the cited cases, of contracts incident to commerce, but not of themselves commerce. In Williams vs. Fears, 179 U. S. 270, 45 L. Ed. 186, 21 Sup. Ct. Rep. 128, there was levied by the state of Georgia a tax upon each emigrant agent or employer or employee of such agent, doing business in the state. The law imposing the tax was attacked as a violation of the commerce clause of the Constitution of the United States. Commerce was defined, quot-

ing Mr. Justice Field, in Mobile County vs. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238, 241, to 'consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' The Court considered the definition comprehensive enough for the purpose of the case, and, testing its application, said, by Mr. Chief Justice Fuller: 'These agents were engaged in hiring laborers in Georgia, to be employed beyond the limits of the state. Of course, transportation must eventually take place as the result of such contracts, but it does not follow that the emigrant agent was engaged in transportation.' The conclusion was supported by cases, among others, Paul vs. Virginia and Hooper vs. California. On the authority of the same cases and New York L. Ins. Co. vs. Cravens, in Ware and Leland vs. Mobile County, 209 U. S. 405, 52 L. Ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, it was held that contracts by brokers for the sale of cotton for future delivery, where the transactions were closed by contracts completed and executed in one state, although the orders were received from another state, were legally subject to a tax. Such contracts, it was said, were not 'the subjects of interstate commerce, any more than in the insurance cases, where the policies are ordered and delivered in another state than that of the residence and office of the company.'

"In Engel vs. O'Malley, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190, a law of New York forbade individuals or partnerships to engage in the business of receiving deposits of money for safe-keeping or for the purpose of transmission to another, or for any other purpose, without a license from the comptroller. It was attacked as a violation of the commerce clause of the Constitution. The case was decided to be similar in principle to Ware & Leland vs. Mobile County and Williams vs. Fears; and the law was sustained."

In the dissenting opinion of the Chief Justice to the judgment of the majority in the Southeastern Underwriters

ase, he emphasized the confusion and conflict (between national and state jurisdiction) which he anticipated; but the most that he said concerning "state taxes which may now be thought to discriminate against the interstate commerce" (his words) was that they would be of seriously doubtful validity. And this was, of course, before the important enactment of Congress of the McCarran law, which was manifestly intended to allay such fears and doubts by temporarily, at least, removing the grounds of them.

The old, but leading, case of Crutcher vs. Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649, contains the significant statement in the opinion that is emphasized in the following quotation:

> "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States, and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, *unless Congress should see fit to interpose some contrary regulation on the subject.*"

In this instance Congress has seen fit to interpose, and has interposed, a "contrary regulation on the subject" by passage of the McCarran Act which is quite simple in its effect, that is, that for the present the regulation (with certain now irrelevant exceptions) and taxation of the interstate business of insurance shall continue by the states. The Act goes further, that any possible doubt may be removed, by the inclusion of the provision to the effect that there is no silence of Congress which might be construed to mean that this form of interstate commerce should go on without regulation or any state legislation which might be held to be a burden upon it and, therefore, in conflict with the Commerce clause of the Constitution.

Congress has plenary power over interstate commerce and we know of no legal obstacle to the exercise of it embodied in the McCarran Act. "Since the commerce clause of the Federal Constitution is not a limitation upon the

power of Congress, a statute enacted by Congress, for the District of Columbia, imposing a tax upon the privilege of doing business within the district, is not subject to the objection that it interferes with or is a burden upon interstate commerce. General Electric Co. vs. District of Columbia (1940) 71 App. D. C. 321, 110 F. (2d) 264; Colgate Palmolive Peet Co. vs. District of Columbia (1940) 71 App. D. C., 324, 110 F. (2d) 264. Both of these decisions followed Neild vs. District of Columbia (1940) 71 App. D. C. 306, 110 F. (2d) 246, which involved a copartnership rather than a foreign corporation." 139 A. L. R. 951.

The brunt of petitioner's argument has been answered in what has been said, but it is incidentally also contended that the application of the tax to the premiums received by petitioner upon its South Carolina business violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal constitution (which are also embraced in Art. 1, Sec. 5 of our State Constitution). But, in any view of it, it does not, under the decisions of the United States Supreme Court. There need only be cited the current case of Lincoln Nat. Life Ins. Co. vs. Read, —— U. S. ——, 65 S. Ct. 1220, —— L. Ed. ——, which was decided during the pendency of this proceeding.

Report of the latter case discloses that the State of Oklahoma levies a premium tax on foreign life insurance companies, similar to the tax questioned in the case at bar, imposed by the State Constitution, and the legislature increased the tax to four per cent. The plaintiff in the action was an Indiana corporation and resisted payment upon the ground that the assessment was discriminatory, because not applicable to domestic insurance companies, and is, therefore violative of the Fourteenth Amendment. The Court made short shrift of the contention and upheld the tax. Question was there also raised concerning a point not involved in the instant contest, to wit, that the plaintiff company was admitted to do business in the state before the statutory increase of the tax, which was, therefore, not legally applicable to it. (Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. ed. 372, 49 ALR 713.) The Court also overruled this contention, upon facts similar to those of our case. But, as already stated, that point

is not made in the present proceeding. It appears that the position was not taken in that case that the plaintiff was engaged in interstate commerce, and the question was not discussed, but the case was decided long after the decision in the Southeastern Underwriters Ass'n. case, *and also after the passage of the McCarran Act.*

Also decided after the Southeastern Underwriters Ass'n case, but apparently before the McCarran Act, was First Nat. Ben. Soc. vs. Garrison, 58 Fed. Supp. 972, in which the plaintiff, an Arizona company, challenged the validity of the California statute regulating the conduct of the insurance business in that state. Taxation was not involved but the lengthy opinion is enlightening upon the subject of the status of the law after the adjudication by the Supreme Court (in the Southeastern Underwriters case) that insurance is commerce, interstate where it crosses state lines, and in the absence of Congressional legislation. State regulation was upheld.

One of the postulates set forth in the Garrison decision, number two, is as follows: "It is a well established principle that Congress may circumscribe its regulation of interstate commerce and occupy a limited field * * *." (It is very clear to us that Congress has expressly circumscribed its regulation of the interstate business of insurance by the enactment of the provisions of the McCarran Act.) Cited with approval was another of the utterances of the Chief Justice in his dissenting opinion in the Southeastern Underwriters case (not at all, however, in conflict with the leading opinion) to the effect that the judgment of the Court in the latter case nowhere gave the slightest intimation that all state laws governing insurance companies were rendered *ipso facto* void but that such matters would have to be decided by a case-to-case determination with consideration of all the respective relevant facts and circumstances; and the California District Court concluded (and this was before the McCarran Act) that it is conceivable that as Congress legislates on insurance, state laws will fall, but only to the extent that they are supplemented (supplanted?) by Federal legislation, and that in the meantime state statutes will continue to control. There were further copius quotations

from the opinion of Mr. Chief Justice Stone, with which this opinion need be extended.

Upon the factual consideration aforementioned and the legal grounds stated, the petition is dismissed, the rule discharged, the temporary restraining order (heretofore issued) dissolved and permanent injunction denied.

D. Gordon Baker, *C. J.*,
E. L. Fishburne, *A. J.*,
T. H. Stukes, *A. J.*,
C. A. Taylor, *A. J.*,
G. Dewey Oxner, *A. J.*

APPENDIX "B"

Sections 7948, 7949 of the Code of Laws of South Carolina, 1942, Volume 4, Chapter 157, Article 1. (pp. 594-596)

Section 7948. *Semi-annual license fees to be paid—returns of premiums collected.* In addition to the annual license fees now provided by law, the commissioner shall require each foreign life insurance company of any class licensed by him not incorporated under the laws of the State of South Carolina, except fraternal benefit orders operating under the grand lodge system, to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i.e., total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the company has done business in this State since making last such return. Such returns shall be made under oath by an executive officer of the company: Provided, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the reserve on all policies issued in South Carolina is invested in any or all of the following securities or property, to-wit: notes or bonds of the State of South Carolina or of counties or municipalities of the

State or of sub-divisions thereof; or first mortgage bonds of real estate in this State; or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State; or average daily balance on deposits in banks of this State maintained continuously for six months next preceding date of such return; or any property situate within the State and returned for taxes therein, at the value at which it is returned, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent. In addition to the annual license fee now provided by law, the insurance commissioner shall require each foreign fire insurance company, each foreign accident and health, each foreign casualty or surety company, and all other companies of any class licensed by him, not incorporated under the laws of the State of South Carolina not hereinbefore specifically mentioned to pay as an additional and graded license fee an amount equal to two per cent, on the total premiums, i.e., total income or total receipts from the State, less return premiums for cancellation on risks in this State during the time the company has done business in this State since last such return. Such returns shall be made under oath by an executive officer of the company; Provided, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the premium receipts on all risks in South Carolina is invested in the securities named in this section, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and sustained shall be one and

three-fourths per centum; under like conditions, if said investments be one-half of said premium receipts, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said premium receipts, the additional license fee shall be one and one-fourth per centum; if the entire premium receipts be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent: Provided, Further, that one-half of the said additional license fee collected under the terms of this section is allotted to the several counties, respectively, in proportion to said premiums collected in said counties, and the same is hereby appropriated to ordinary county purposes, and no additional license fee or county tax shall be levied on such companies. At the close of the semi-annual period, or as soon thereafter as possible, the insurance commissioner shall furnish the state treasurer a statement showing the amount of said premiums collected by each company in each of the several counties of the State, and the amount of additional license fees collected thereon; and the state treasurer, upon a warrant from the comptroller general, shall pay into the county treasury of each county one-half of the additional license fee collected as aforesaid on the said premiums collected by each insurance company in that county: Provided, that nothing in this article or any other article shall be construed as preventing any municipality from levying and collecting license fees or taxes in accordance with its ordinances. The return of said premium collections shall be made within thirty days after the 30th day of June and the 31st day of December of each year, and if the returns are not so made, the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the State to collect any unpaid portion of license fees provided herein.

Section 7949. *Additional annual license fee.*—The Insurance Commissioner of South Carolina is hereby directed to require all insurance companies doing business in this State, including all domestic companies and all other companies of any class licensed by such insurance commissioner and

This question should not be summarily decided on a motion to dismiss or affirm. Similar statutes in other states are presently being litigated not only by Appellant but by other insurance companies. A decision in this case will greatly assist in deciding similar questions in other cases, if, in fact, it would not control them. Therefore, this question merits the complete development and presentation which can only be obtained by full argument and review on appeal.

We, therefore, submit that your Honorable Court should deny the Motion to Dismiss or Affirm and should take jurisdiction of this appeal.

Respectfully submitted,

JOSEPH W. HENDERSON,
DOUGLAS MCKAY,
Attorneys for Appellant.

not incorporated under the laws of South Carolina to pay, in addition to the annual license fee, now provided by law, a graduated license fee in an amount equal to one (1%) per cent of the total premiums collected in the State, less return premiums for cancellation on risks: Provided, that the terms hereof shall not apply to domestic insurance companies; and Provided, Further, that mutual fire insurance companies of other States, admitted to do business in this State, employing no agents, writing no business except on the property of its members, and doing business without profit shall pay annually on or before the first day of March, in addition to all other license fees which they are now required by law to pay, a graduated annual license fee in an amount equal to one (1%) per centum of the premiums and premiums deposits and assessments collected by them in the State during the year ending on the thirty first day of December next preceding, after deducting from such premiums and premium deposits and assessments the so called dividends or unused or unabsorbed portion of the premiums and premium deposits and assessments applied or credited in part payment of such premiums or premium deposits and assessments or returned to policyholders in cash or otherwise during the year for which the said tax is computed.

The one (1%) per cent fee as provided for in the preceding paragraph shall be paid into the state treasury for state purposes, and the insurance commissioner of South Carolina is hereby required to collect said fee as other fees are collected and pay over to the State treasurer.

This section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws, but it is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes.

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IN THE

Supreme Court of the United States

No. 707.

October Term, 1945.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

v.

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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TABLE OF CASES CITED.

	Page
Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935)	4
Best & Co. v. Maxwell, 311 U. S. 454 (1940)	3
Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942)	5
Crutcher v. Kentucky, 141 U. S. 47 (1891)	4
Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936)	4
General American Tank Car Corp. v. Day, 270 U. S. 367 (1926)	2
Hale v. Bimco Trading Co., 306 U. S. 375 (1939)	3, 4
International Shoe Company v. State of Washington, — U. S. — (October Term, 1945, No. 107, decided December 3, 1945)	4
Interstate Busses Corporation v. Blodgett, 276 U. S. 245 (1928)	2
Lincoln National Life Insurance Company v. Read, — U. S. —, 89 L. Ed. 1250 (1945)	4
Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937)	4
Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887)	4
Scott v. Donald, 165 U. S. 58 (1897)	4
Southern Pacific Company v. State of Arizona, — U. S. —, 89 L. Ed. 1469 (1945)	4, 5
Sprout v. City of South Bend, 277 U. S. 163, 170-171 (1928)	3
Standard Dredging Corporation v. Murphy, 319 U. S. 306 (1943)	5
Welton v. The State of Missouri, 91 U. S. 275 (1875)	3, 4

MISCELLANEOUS.

	Page
Constitution of the United States:	
Article I, Section 8, Clause 3	1, 4
Fourteenth Amendment	4
Federal Unemployment Tax Act, 26 U. S. C. A. §§ 1600-1611	5
McCarran-Ferguson Act, Public Law No. 15, 79th Congress, Chapter 20, 1st Session, 15 U. S. C. A. §§ 1011-1015	4, 5
South Carolina Code, Sections 7948-7949	3

IN THE

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No. 707,

OCTOBER TERM, 1945.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Appellant,

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L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

The Statement As To Jurisdiction, filed by the Appellant in this proceeding, sets forth not only the basis of jurisdiction but also in detail the reasons why the judgment of the Supreme Court of the State of South Carolina should be reversed. Facts are clearly stated therein which show that the federal questions involved are substantial; that the tax statutes of South Carolina constitute a direct and unreasonable burden upon interstate commerce in the conduct of Appellant's insurance business; that such discrimination is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States; and that said tax statutes were not within the regulation or taxation contemplated under the McCarran-Ferguson Act.

The Appellant, however, files this brief in answer to the six propositions submitted by Appellee in his brief in support of his Motion to Dismiss or Affirm.

I.

The Appellant has clearly shown that the tax laws of South Carolina unquestionably discriminate against foreign

insurance companies. The facts set forth in Appellant's Petition for Injunction and Equitable Relief make plain this discrimination. Moreover, although the Supreme Court of the State of South Carolina stated in its opinion (a) that said premium tax is "neither a burden upon interstate commerce nor discriminatory against a foreign company", and (b) that "upon the showing made" (namely, statistics in the petition and uncontested by the return which "do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond") "there is no merit in the contention that the tax is discriminatory for there is no proof that there is a net or real discrimination against petitioner, a foreign insurance company, as compared with a domestic one, under the laws of this state, to which it is subject in the conduct of its business here", said statements are contrary to the undisputed evidence and injected an issue in the case that was not warranted by the record. Furthermore, not only are the *ad valorem* property taxes paid by domestic companies neither corresponding nor correlative taxes but also, even if said property taxes be considered corresponding or correlative taxes, there was no evidence that the amount of property taxes paid by domestic companies was sufficient to offset the discrimination of "premium taxes".

Moreover, after said opinion was filed, Appellant forthwith filed a motion in said court for an order which would permit Appellant to file in the record a statement of real estate taxes paid in South Carolina by domestic insurance companies to answer the issue of real estate taxes which had thus been injected into the case and to substantiate still further its claim of discrimination. Said motion was denied.

The cases of *General American Tank Car Corp. v. Day*, 270 U. S. 367 (1926) and *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245 (1928), cited by Appellee, are not

applicable. In the former case, the state tax levied on interstate commerce was in lieu of other taxes levied on intrastate commerce. In the latter case this Court reasoned that the validity of a Connecticut mileage tax against interstate commerce was not a substantially greater burden on interstate commerce than Connecticut's correlative gross receipts tax on comparable intrastate business, and the proceeds from both taxes were expended for the maintenance of Connecticut's highways. In the instant case, domestic insurance companies are not subject to any correlative or corresponding tax.

II.

While corporations whose business includes interstate and intrastate activity may be subject to legal non-discriminatory regulation and taxation by state governments, the Appellant contends herein that such regulation and taxation must not unjustly discriminate against, nor be a burden upon, interstate commerce, as do the South Carolina statutes involved herein.

III.

Sections 7948-7949 of the South Carolina Code do not "place a tax purely on intrastate activity" of the Appellant, as stated by Appellee, even though the tax is based on the premiums received from Appellant's insurance business in South Carolina during the preceding year. As set forth in Appellant's Statement As To Jurisdiction, the tax is on the Appellant's interstate insurance business, even if it be measured by the gross premiums received in the state. A state may not impose discriminatory taxes or licenses upon the privilege of engaging in *interstate* commerce. *Welton v. The State of Missouri*, 91 U. S. 275 (1875); *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939); *Best & Co. v. Maxwell*, 311 U. S. 454 (1940); *Sprout v. City of South Bend*, 277 U. S. 163, 170-171 (1928).

IV.

Appellant has not claimed in this proceeding that the state tax statutes are in violation of the Fourteenth Amendment. This Court in *Lincoln National Life Insurance Company v. Read*, — U. S. —, 89 L. Ed. 1250 (1945) has already adjudicated that question. Appellant claims herein that the South Carolina tax statues are unconstitutional in that they violate the "commerce clause", Article I, Section 8, Clause 3 of the Constitution of the United States. *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936); *Welton v. The State of Missouri, supra; Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Hale v Bimco Trading Co., supra.*

V and VI.

Public Law No. 15, 79th Congress, Chapter 20, 1st Session, (15 U. S. C. A. §§ 1011-1015) known as McCarran-Ferguson Act, does not validate the state premium tax statutes. That Act was not intended to permit, nor could it legally permit, discriminatory regulation or taxation of interstate commerce in the conduct by the Appellant of its insurance business in South Carolina. *Welton v. The State of Missouri, supra; Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887); *Scott v. Donald*, 165 U. S. 58 (1897).

The cases cited by Appellee are neither in point nor determinative of the effect of the McCarran-Ferguson Act. In *International Shoe Company v. State of Washington*, — U. S. — (October Term, 1945, No. 107, decided December 3, 1945) the enabling act of Congress specifically stated that a person was not relieved from compliance with state unemployment tax statutes because engaged in interstate commerce and the state statute under review does not appear to have differentiated between intrastate and interstate business. *Southern Pacific Company v. State of Ari-*

zona, — U. S. —, 89 L. Ed. 1469 (1945) likewise is inapplicable on its facts. Furthermore, your Honorable Court in this case, just as in the *Southern Pacific Company* case, should be the final arbiter between the competing demands of state and national interest after a full and complete review of the important questions involved. Similarly, *Standard Dredging Corporation v. Murphy*, 319 U. S. 306 (1943), merely held that, even though the Federal Unemployment Tax Act (26 U. S. C. A. §§ 1600-1611) exempted employers of maritime employees working on vessels on navigable waters, such exemption did not relieve them from state unemployment insurance taxes. Likewise, in *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942) this Court in construing conflicting state and federal statutes was required to decide whether federal legislation supervising the manufacture of renovated butter superseded and made inoperative a state statute on the same subject matter.

In the instant case, the McCarran-Ferguson Act merely evidences Congressional intent to allow such continued regulation by the states as is not discriminatory against foreign insurance companies, and to give to insurance companies a period of grace in which to adjust any intercompany relationships and cease any violation of the Sherman Act. Congress had no intention of superseding the police-power regulations of the states with regulations of its own, and never intended to validate tax statutes which unjustly discriminated against interstate commerce of foreign insurance companies.

Conclusion.

This appeal presents a most important constitutional question which directly affects the business of insurance throughout the United States which has not herebefore been decided by this Court and which Appellant maintains has been erroneously decided by the Supreme Court of South Carolina.

BRIEF FOR THE APPELLANT

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IN THE

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THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,

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L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina.

BRIEF FOR APPELLANT.

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"Certainly there cannot but be serious doubt as to the validity of state taxes which may now be thought to discriminate against the interstate commerce."

STONE, C. J., in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 581 (1944).

SUBJECT INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Specification of Errors Intended to be Urged	11
Summary of Argument	13
Argument	14
I. The Appellant's Insurance Business in South Carolina Constitutes Interstate Commerce	14
II. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, Violate the Commerce Clause of the Constitution of the United States in That They Illegally Discriminate Against Appellant's Interstate Insurance Business in South Carolina	19
III. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, Are Not Offset by Any Corresponding or Correlative Tax or Taxes Nor Can They Be Sustained as a Privilege Tax	31
A. The Premium Taxes Are Not Offset by Any Corresponding or Correlative Tax or Taxes	31
B. Sections 7948 and 7949 of the Code of Laws of South Carolina are not privilege taxes	38
IV. The McCarran-Ferguson Act Was Not Intended to Permit, Nor Could It Validly Permit, Discriminatory Regulation or Taxation of Interstate Commerce	39
Conclusion	58

SUBJECT INDEX (Continued).

	Page
Appendix	61
Section 7948 of the Code of Laws of South Carolina, 1942	61
Section 7949 of the Code of Laws of South Carolina, 1942	63

TABLE OF CASES CITED.

	Page
Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511 (1935)	24, 25, 34
Best & Co. v. Maxwell, 311 U. S. 454 (1940)	25, 27, 34, 35
Chicago, Indianapolis & Louisville Railway Company v. Hackett, 228 U. S. 559 (1913)	53
Clark Distilling Company v. Western Maryland Railway Company and State of West Virginia, 242 U. S. 311 (1917)	46
Cooley v. Wardens of the Port of Philadelphia, 12 How. 299 (1851)	43, 49
Crutcher v. Kentucky, 141 U. S. 47 (1891)	38, 39
Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282 (1921)	39
Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936)	39
General American Tank Car Corp. v. Day, 270 U. S. 367 (1926)	35
Guy v. Baltimore, 100 U. S. 434 (1879)	25
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939)	29, 56
Hale v. Bimco Trading Co., 306 U. S. 375 (1939)	25, 26
Henneford v. Silas Mason Co., Inc., 300 U. S. 577 (1937)	34
Hinson v. Lott, 8 Wall. 148 (1868)	34
Hooven & Allison Co. v. Evatt, 324 U. S. 652 (1945)	33
In re: Insurance Tax Cases, 160 Kans. 300, 161 P. (2d) 726 (1945)	30, 40, 51
In re Rahrer, 140 U. S. 545 (1891)	46
International Shoe Company v. State of Washington, — U. S. —; 66 Sup. Ct. 154	48
International Text Book Co. v. Pigg, 217 U. S. 91 (1910)	39
Interstate Busses Corporation v. Blodgett, 276 U. S. 245 (1928)	36

TABLE OF CASES CITED (Continued).

Page

Kentucky Whip & Collar Co. v. Illinois Central Railroad Co., 299 U. S. 334 (1937) 47
Leisy v. Hardin, 135 U. S. 100 (1890) 46
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 25, 27
Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937) 39
Rhodes v. Iowa, 170 U. S. 412 (1898) 46
Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887) 25, 44, 54
Scott v. Donald, 165 U. S. 58 (1897) 50
South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U. S. 177 (1938) 28, 55
Southern Pacific Company v. State of Arizona, — U. S. —, 65 Sup. Ct. 1515 (1945) 29, 56
State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942) 27, 56
Union Refrigerator Transit Company v. Kentucky, 199 U. S. 194 (1905) 35
United States v. La Franca, 282 U. S. 568 (1931) 53
United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932) 52
United States v. South-Eastern Underwriters Association, 322 U. S. 533 (1944) 2, 7, 14, 15, 16, 18, 25, 50
United States v. Standard Brewery Co., 251 U. S. 210 (1920) 52
Webber v. Virginia, 103 U. S. 344 (1880) 25
Welton v. The State of Missouri, 91 U. S. 275 (1875) 24, 25, 44
Western Union Telegraph Company v. Kansas, 216 U. S. 1 (1910) 39
Whitfield v. State of Ohio, 297 U. S. 431 (1936) 46, 47
Woodruff v. Parham, 8 Wall. 123 (1868) 34

TABLE OF STATUTES AND CONSTITUTION CITED.

	Page
Act of January 31, 1928, c. 14, § 1; 45 Stat. 54 (28 U. S. C. A. § 861a)	2
Act of July 2, 1930, c. 801, 46 Stat. 845; 16 U. S. C. A. § 852	48
Act of June 29, 1940, c. 443, 54 Stat. 686; 15 U. S. C. A. 1001	48
Ashurst-Sumners Act, Act of July 24, 1935, c. 412, § 1, 49 Stat. 494; 18 U. S. C. A. § 396b	45, 47
Constitution of the United States:	
Article I Section 1	13, 54
Article I Section 8, Clause 1	12, 54
Article I Section 8, Clause 3	7, 12
Fifth Amendment	13, 54
Federal Unemployment Tax Act, Act of August 10, 1939, c. 666 § 613, 53 Stat. 1391; 26 U. S. C. A. § 1606 (a)	48
Hawes-Cooper Act, Act of January 19, 1929, c. 79, §§ 1, 2, 45 Stat. 1084; 49 U. S. C. A. § 60	45, 46
Judicial Code, Section 237 (28 U. S. C. A. § 344)	1
Lacey Act, Act of May 25, 1900, c. 553, § 5, 31 Stat. 188; 18 U. S. C. A. § 395	45
McCarran-Ferguson Act, Act of March 9, 1945, c. 20, 59 Stat. 34; 15 U. S. C. A. § 1011-1015	9, 39
Plant Quarantine Act, Act of April 13, 1926, c. 135, 44 Stat. 250; 7 U. S. C. A. § 161	48
Renovated-Butter Act, Act of May 9, 1902, c. 784, § 1, 32 Stat. 193; 21 U. S. C. A. § 25	45
Section 7948 of the Code of Laws of South Carolina, 1942	2, 3, 8, 19, 20, 30, 31, 38, 53, 61
Section 7949 of the Code of Laws of South Carolina, 1942	2, 3, 8, 19, 20, 30, 31, 38, 53, 63
Webb-Kenyon Act, Act of March 1, 1913, c. 90, 37 Stat. 699; 27 U. S. C. A. § 122	45, 46
Wilson Act, Act of August 8, 1890, c. 728, 26 Stat. 313; 27 U. S. C. A. § 121	45, 46

TABLE OF AUTHORITIES CITED.

	Page
Senator McCarran, 91 Cong. Rec., Feb. 26, 1945, at 1471	40
Senator O'Mahoney, 91 Cong. Rec., Feb. 27, 1945, at 1554 and 1557	41

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Appellant;

v.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF FOR APPELLANT.

This case comes before the Court on appeal from a final judgment of the Supreme Court of the State of South Carolina.

OPINIONS BELOW.

The per curiam opinion of the Supreme Court of the State of South Carolina was filed on September 13, 1945, and appears on page 18 of the Record. It is not yet reported in the South Carolina Reporter but is reported in 35 S. E. (2d) 586.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the Supreme Court of the State of South Carolina is provided by Section 237 of the Judicial Code (28 U. S. C. A. § 344) under which a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had (wh[illegible] is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the

decision is in favor of its validity) may be reviewed by the Supreme Court of the United States by writ of error. By Act of January 31, 1928, c. 14 § 1; 45 Stat. 54 (28 U. S. C. A. § 861a) the remedy by appeal has been substituted for writ of error in such cases.

The statutes of the State of South Carolina, which the Appellant contends are repugnant to the Constitution of the United States, are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, (Volume 4, Chapter 157, Article 1, pp. 594-596). These statutes (which the Supreme Court of South Carolina has declared valid) provide, *inter alia,* that each foreign insurance corporation must annually pay taxes in the aggregate amount of three (3%) per cent. of the premiums received from its insurance business in South Carolina during the preceding year (less minor reductions in the event the foreign corporation invests its reserve in South Carolina securities or property) and that domestic insurance corporations are exempt from said taxes.

STATEMENT OF THE CASE.

Are Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942,[1] constitutional which imposes taxes on the Appellant, a foreign insurance corporation, in the aggregate amount of three (3%) per cent. of the insurance premiums received from Appellant's insurance business in South Carolina during the preceding year, less minor reductions in the event of certain investments? Said statutes further provide that payment of said taxes is a condition precedent to Appellant's obtaining a certificate of authority to transact its insurance business in South Carolina.

Subsequent to the decision of this Court in the case of *United States v. South-Eastern Underwriters Association,* 322 U. S. 533 (1944), in which insurance business as transacted by the Appellant herein was held to be interstate com-

1. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, are set forth verbatim on pages 61 to 64 in the Appendix hereto.

merce, The Prudential Insurance Company of America, a corporation organized under the laws of the State of New Jersey, with its principal office located at Newark, New Jersey, requested the Insurance Commissioner of the State of South Carolina to issue to it certificates of authority to do its business in said state during the insurance year of 1945-1946 without the payment by Appellant of South Carolina taxes as provided in the aforesaid Sections 7948 and 7949. (R. 8, 16.) The request was based on the ground that the laws which imposed said taxes (from which domestic insurance companies were exempt) were unconstitutional in that, *inter alia*, they violated the commerce clause, to wit, Article I, Section 8, Clause 3 of the Constitution of the United States. The Insurance Commissioner declined the request and demanded payment of the said taxes as the condition for issuing its certificates of authority. (R. 8, 16.)

The Appellant then filed in the Supreme Court of the State of South Carolina a Petition for Injunction and Equitable Relief and obtained on March 29, 1945 a rule on said Insurance Commissioner to show cause why he should not be enjoined and restrained from collecting said taxes and from revoking or suspending Appellant's certificate of authority for its failure to pay said taxes. (R. 1.)

The following facts were averred by the Appellant in its petition:

The Appellant commenced its insurance business in 1875, and has been authorized to do business in South Carolina since 1897. (R. 2, 5.) It is engaged exclusively in the business of issuing all forms of life insurance, group insurance, and annuity contracts. (R. 2.)

All the business and operations of the Appellant are conducted by its Board of Directors and executive management at and from its Home Office in Newark, New Jersey, and radiate from that office into all of the forty-eight states of the United States, the District of Columbia, the Territory of Hawaii, and the Dominion of Canada. (R. 2.)

The Board of Directors meets only at the Home Office of the Appellant in New Jersey, and all the executive officers of the Appellant are located and act as such at said Home Office. (R. 2.) Field representatives of the Appellant (by which is meant its entire agency selling force and all its representatives and employees outside its Home Office) have no authority to transact business independently on behalf of the Appellant, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Appellant acting at the Home Office in New Jersey. (R. 2, 3.)

Policies insuring the lives of persons are issued by the Appellant at the present time in various forms, including Life, Endowment and Term insurance, and cover various fields of insurance, including Ordinary, Group and Industrial. Annuity contracts issued by the Appellant at the present time include both immediate and deferred annuities. (R. 3.) On December 31, 1944, the Appellant had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. (R. 3.) During the year 1944 the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons, in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such lives. (R. 3.) During the year 1944 the Appellant collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,690,781.93 on annuity contracts. (R. 3.)

The terms and conditions of all types of insurance policies and annuity contracts are determined by the officers of the Appellant and their assistants at the Home Office. (R. 3.) Applications for insurance policies, an-

nuity contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory in which the applicant resides. (R. 3.) Medical examinations and investigations of prospective risks are made by local physicians and investigators. (R. 3.) All applications and reports are transmitted by its agents from the states in which they are received, by mail, telegraph and telephone, across state lines to the Home Office in Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued. (R. 3.) After issuance, policies of insurance and annuity contracts are transmitted from its Home Office across state lines to its respective agents for delivery to the insured. (R. 3.)

The investments made by the Appellant are governed by detailed statutes of the State of New Jersey and, subject to those statutes, are rigidly controlled by the Board of Directors of the Appellant acting at its Home Office in New Jersey, which specifically authorizes every investment made by the Appellant. (R. 4.) In addition, the Appellant maintains cash balances in 514 banks and trust companies located throughout the United States and the Dominion of Canada. (R. 4.) All the Bank deposits hereinabove referred to are subject to the control of the Board of Directors and the executive officers of the Appellant acting at its Home Office in Newark, New Jersey; all the securities purchased by the Appellant, including mortgages, but excepting (during wartime) Canadian securities, are delivered to it in the State of New Jersey and physically kept in the vaults of the Appellant at the Home Office in Newark, New Jersey (except securities deposited with governmental authorities as required by law or in connection with court proceedings), and are subject to the exclusive control and management of the Board of Directors and the executive officers of the Appellant acting at the Home Office in New Jersey. (R. 4.) As of December 31, 1944, the assets of the Appellant amounted to $5,856,880,814.84. (R. 4.)

The performance of the life insurance and annuity contracts, and the operation of the life insurance business of the Appellant in all its manifold phases, require the movement of information, documents and money on a large scale across state lines. (R. 4.) During the year 1944 the Appellant expended approximately $1,277,000 for postage, telephone, telegraph and express services, approximately $351,000 for traveling expenses, approximately $475,000 for advertising in magazines circulating throughout the United States, and approximately $900,000 in radio programs broadcast throughout the nation. (R. 4.) Inherent in the Appellant's business is the continuous use of the channels of interstate commerce for the transmission of such information, documents and money. (R. 4, 5.)

The Appellant, which was originally authorized to do business in the State of South Carolina, under license issued pursuant to the laws of said State, in the year 1897, has since that time received annual renewals of its said license whereby it has been authorized to do business in that state up to and including March 31, 1945. (R. 5.) On December 31, 1944, the Appellant maintained 4 District Offices in the State of South Carolina, employed 12 persons in said Offices and had contracts with 21 agents engaged in selling insurance therein. (R. 5.) At that time the Appellant had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. (R. 5.) During the year ending December 31, 1944, 1,439 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of residents. (R. 5.) All the business in which the Appellant is now engaged in the State of South Carolina, and all the business which the Appellant has done in such State in the past, has been of the nature and performed in the manner hereinabove set forth in the preceding paragraphs. (R. 5.) All such business has been and is interstate commerce. (R. 5.)

The taxes provided for under the aforesaid Sections 7948 and 7949 are illegal and void (and the aforesaid statutes under which they are imposed are unconstitutional) in that they violate, *inter alia*, Article I, Section 8, Clause 3 of the Constitution of the United States not only by imposing a direct and unreasonable burden upon, interference with, or regulation of interstate commerce in the conduct of Appellant's business but also by illegally and unjustly discriminating against interstate commerce of foreign insurance companies like the Appellant and in favor of local commerce of South Carolina domestic insurance companies, which are specifically exempt from said taxes and are not subject to any correlative, corresponding, equivalent, or similar tax or taxes.

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2. Compare these facts with the statement of Mr. Justice Black on page 539 of the *South-Eastern Underwriters* case in which he described the commanding position which the modern insurance business holds in the trade and commerce of the nation,

"The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most most important branches of commerce. Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

"This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state."

The discrimination against the interstate commerce of the Appellant was further shown by a schedule, attached as Exhibit A[3] comparing the taxes demanded of Appellant under the Sections 7948 and 7949 with the taxes required of the five most comparable domestic insurance companies. (R. 7, 8, 10.)

3. EXHIBIT A

COMPARISON OF PREMIUM AND OTHER TAXES PAID TO THE STATE OF SOUTH CAROLINA ON 1943 AND 1944 BUSINESS BY THE PRUDENTIAL AND BY THE FIVE LARGEST SOUTH CAROLINA DOMESTIC LIFE INSURANCE COMPANIES

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
	1943 South Carolina Premiums Column #1 Schedule T Life and Casualty *	State Premium Tax Thereon	1944 South Carolina Premiums Column #1 Schedule T Life and Casualty *	State Premium Tax Thereon	All Other State or Local Taxes Paid in 1944 †	Total of Column 2 and Column 5	Total of Column 4 and Column 5
The Prudential Insurance Company of America	$ 858,915.82	$18,496.87	$ 876,305.61	$19,676.94	$ 3,103.92	$21,600.79	$22,780.86
Liberty Life Ins. Co.	5,339,320.20	—0—	6,164,600.50	—0—	13,178.40	13,178.40	13,178.40
Carolina Life Ins. Co.	1,748,356.86	—0—	2,028,153.03	—0—	12,171.75	12,171.75	12,171.75
Atlantic Coast Life Insurance Company	937,055.99	—0—	1,182,037.72	—0—	1,618.35	1,618.35	1,618.35
Palmetto State Life Insurance Company	931,768.12	—0—	1,060,275.58	—0—	5,960.30	5,960.30	5,960.30
Capitol Life and Health Insurance Company	500,761.13	—0—	783,675.84	—0—	2,975.18	2,975.18	2,975.18

* Figures taken from annual statement on file in South Carolina Insurance Department.

† These figures include, for the South Carolina companies, social security taxes and taxes paid in other states in which the respective companies are doing business, which your petitioner was unable to eliminate from the figures given in the annual statements. They do not include real estate taxes.

As there was no provision in the law of South Carolina permitting the Appellant to pay said taxes under protest and to sue for the recovery thereof, it was necessary for the Appellant to institute the proceedings it did. (R. 8.) However, in addition to seeking equitable relief, the Appellant also filed the Returns required under said sections and asked leave to deposit with the Clerk of said Court moneys in the amount of taxes involved to abide the determination of this cause. (R. 9.)

The Supreme Court of the State of South Carolina granted the requested rule to show cause, and the Appellant deposited with the Clerk of said Court its certified checks in the amount of $20,936.69 representing the amount of taxes involved.

The Insurance Commissioner of the State of South Carolina thereupon filed two pleadings in answer to Appellant's Petition: (1) a Demurrer, and (2) a Return to Rule to Sho Cause and Reply to Petition. (R. 11, 13.)

In the Demurrer he maintained that the Appellant had not set up a cause of action in said Petition for four reasons: (1) the payment of said taxes was a proper condition precedent to the granting of privilege of doing business within the state; (2) the tax was not an unlawful burden on interstate commerce and was valid under the McCarran-Ferguson Act (15 U. S. C. A. §§ 1011-1015); (3) the tax was not discriminatory, but was one which all foreign insurance companies were required to pay; and (4) the action was against the State and without its permission. (R. 11-13.)

In the Return to Rule to Show Cause and Reply to Petition, the Insurance Commissioner denied that the business of the Appellant constituted interstate commerce; that there was any illegal discrimination against Appellant; and that the taxes created a burden on interstate commerce. (R. 14, 15, 16.) He also affirmatively averred therein that the state in the exercise of its police power could impose said taxes; that said taxes were valid "privilege taxes"

and that said taxes were further validated by the McCarran-Ferguson Act. (R. 14, 15, 16, 17.)

The case was submitted to the Supreme Court of South Carolina on the basis of the aforesaid pleadings, and, after argument, said Court on September 13, 1945, filed its opinion in which it upheld the constitutionality of said statutes, dismissed said petition, discharged said rule, dissolved the temporary restraining order theretofore filed and denied a permanent injunction. (R. 18, 29.) On that date, judgment was entered in favor of the Insurance Commissioner and against the Appellant as set forth in the opinion. (R. 29.)

On September 24, 1945, a petition for rehearing was filed by appellant. (R. 29.)

Since the Supreme Court of the State of South Carolina in its opinion [4] injected an issue in the case with respect to taxation of domestic insurance companies which was contrary to and unsupported by the undisputed evidence, the Appellant presented on October 1, 1945 a motion for an order permitting Appellant to file in the record of this proceeding (pending determination of its petition for rehearing) a statement of real estate taxes paid in South Carolina by domestic insurance companies. (R. 35.) Not only were the *ad valorem* property taxes referred to in said opinion as paid by domestic companies neither corresponding nor correlative taxes but, even if said property taxes were to be considered corresponding or correlative, the Appellant desired to show by said statement that the amount

4. "It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax which petitioner resists for the first time, and so far apparently alone among the many nonresident insurance companies operating in the state, may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a 'foreign' company. such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by the petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies." (R. 22)

of property taxes paid by domestic companies did not offset the discrimination of said "premium taxes". (R. 35, 36.) Said motion, however, was refused by the Court on October 8, 1945. (R. 36.)

On October 22, 1945, the Appellant's Petition for Rehearing was denied. (R. 34.)

Subsequently, L. George Benjamin, who in the meantime had succeeded D. D. Murphy as Insurance Commissioner, was substituted in his official capacity of Insurance Commissioner in place of said D. D. Murphy by appropriate order of the Supreme Court of the State of South Carolina, dated November 19, 1945. (R. 37.)

The Appellant thereafter filed on November 30, 1945, with the Supreme Court of the State of South Carolina, its Petition for Appeal, together with its Assignment of Errors and Statement as to Jurisdiction, and a cost bond having been submitted for the Court's approval, said Court under said date entered its Order Allowing An Appeal to this Court and approving the filing of the cost bond submitted. (R. 37, 40, 43, 44.)

The Appellee under date of December 14, 1945, filed his Motion to Dismiss or Affirm and Brief in support thereof.

On December 31, 1945, the within appeal was docketed in this Court by the Appellant, and on January 2, 1946, the Appellant filed its Brief in Opposition to Motion to Dismiss or Affirm.

On January 28, 1946, this Court entered an order noting probable jurisdiction. (R. 47.)

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The Appellant, in compliance with Rule 13 (9) of this Court, filed its Statement of the Points On Which It Intends to Rely wherein it adopted *in toto* its Assignments of Error (R. 40) as the Statement of Points On Which It Intends to Rely. (R. 47.)

The Appellant intends to urge each of the errors heretofore filed and claimed in its Assignments of Error, namely:

(a) Those concerning the question whether the business of insurance when transacted across state lines is interstate commerce and whether the Appellant's insurance business in South Carolina is interstate commerce, to wit: Assignments of Error Nos. 1 and 10 (R. 40, 43).

(b) Those concerning the question whether the South Carolina "premium tax" statutes illegally and unjustly discriminate against the interstate commerce of Appellant and in favor of local commerce of South Carolina domestic insurance companies in violation of the commerce clause of the Constitution, to wit: Assignments of Error Nos. 3 and 10 (R. 41, 43).

(c) Those concerning the question whether the South Carolina "premium tax" statutes impose a direct and unreasonable burden upon, interference with, and regulation of interstate commerce in violation of the commerce clause of the Constitution, to wit: Assignments of Error Nos. 2 and 10 (R. 40, 43).

(d) Those concerning the statements by the Supreme Court of South Carolina in its opinion that the premium tax was not a burden on interstate commerce and that the premium tax was not discriminatory and also concerning said Court's refusal to permit Appellant to file a statement of real estate taxes paid in South Carolina by domestic insurance companies, to wit: Assignments of Error Nos. 8, 9, and 10 (R. 42, 43).

(e) Those concerning the question whether the McCarran-Ferguson Act was intended to permit discriminatory regulation and taxation of interstate commerce and whether, if intended to permit discriminatory regulation and taxation of interstate commerce, said Act is invalid and in violation of Article I, Section 8, Clauses 1 and 3 of the

Constitution, of Article I, Section 1 of the Constitution, and of the Fifth Amendment to the Constitution, to wit: Assignments of Error Nos. 4, 5, 6, 7 and 10 (R. 41, 42, 43).

SUMMARY OF ARGUMENT.

The sole issue involved in this case is a discriminatory tax in favor of domestic intrastate commerce and against interstate commerce. Appellant does not challenge the power of a state to impose reasonable and non-discriminatory taxes, nor does it challenge the right of a state to subject Appellant to reasonable and non-discriminatory police power regulations.

The issue of discrimination, in this case, involves the following points:—

1. That the insurance business in which Appellant is engaged, including its business in South Carolina, is interstate;

2. That the South Carolina statutes which discriminate against interstate commerce in favor of domestic intrastate commerce are invalid; and

3. That such invalidity is not cured, nor was it intended to be cured, by the McCarran-Ferguson Act.

Argument.

I. THE APPELLANT'S INSURANCE BUSINESS IN SOUTH CAROLINA CONSTITUTES INTERSTATE COMMERCE.

(*Assignments of Error Nos. 1 and 10.*)

In *United States v. South-Eastern Underwriters Association, et al.*, 322 U. S. 533 (1944), this Court has held that the business of insurance when transacted across state lines constitutes interstate commerce.

The Supreme Court of the State of South Carolina so held when the present litigation was pending before it, because it stated at the very beginning of its opinion:

> "For a great many years, perforce the decision of the Supreme Court of the United States in Paul v. State of Virginia, 75 U. S. (8 Wall.) 168, 19 L. Ed. 357, the transaction of the business of insurance across state lines was not interstate commerce and, therefore, was not subject to the control of Congress. 29 Am. Jur., Insurance, Sec. 35. This longstanding status was upset by the result of the recent case of *United States v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440. Overruling the earlier case, *the latter held that when the insurance business crosses state boundaries, it is interstate commerce.*" (R. 18.) (Italics ours.)

The facts set forth in Appellant's Petition for Injunction and Equitable Relief (to which the Appellee demurred) are similar to those considered by this Court in the *South-Eastern Underwriters* case and clearly establish that the Appellant's insurance business in South Carolina constitutes interstate commerce.

In the *South-Eastern Underwriters* case this Court in the majority opinion adverted to certain aspects of the business of the insurance companies in that case as estab-

lishing not only that such business constituted commerce but also that it was interstate commerce.

This Court, speaking through Mr. Justice Black, first referred to the commanding position which modern insurance business holds in the trade and commerce of our nation and that "it has become one of the largest and most important branches of commerce."

There can be no doubt of the position which the Appellant holds in the insurance business of our nation. The Appellant's assets on December 31, 1944 amounted to $5,856,880,814.84, and had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,134,075 and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives (R. 3, 4, 13.) During that year the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons in the total amount of $2,668,714,022 and entered into 451 annuity contracts which provided for an annual income of approximately $150,000 on the lives of 600 persons, and also collected the sum of $681,052,095.07 as premiums on insurance policies and paid out the sum of $246,776,197.45 as claims on policies and the sum of $13,690,781.93 on its annuity contracts (R. 3, 13).

Next, the Court in the *South-Eastern Underwriters* case referred to the multi-state aspect of the insurance business, pointing out particularly that "the business is not separated into 48 distinct territorial compartments which function in isolation from each other." (P. 541.) The Appellant's insurance business fits that description. It radiates from its Home Office at Newark, New Jersey, where all of its business and operations are conducted by its Board of Directors and its executive management, into all the forty-eight states, the District of Columbia, the Territory of Hawaii and the Dominion of Canada (R. 2, 13).

The Court further referred to the fact that this multi-state insurance business not only is centrally operated by

the various companies through their respective home offices, but also to the fact that the insurance companies are continuously required by the very nature of their business to use the facilities of interstate commerce, such as the mails, telegraph, telephone, and express services. Identical facts have been established in this case with respect to the Appellant's business. (R. 2, 3, 4, 13.)

Although applications for insurance policies, annuity contracts, and other miscellaneous matters pertaining thereto, are received by agents operating in the territory where the applicant resides, and although medical examinations and investigations of prospective risks are made by local physicians and investigators, these persons have no authority to transact business independently on behalf of the Appellant, but may only take such action and perform such duties as are specifically authorized by the executive officers of the Appellant acting at the Home Office in New Jersey (R. 3, 13). All applications and reports are transmitted by mail, telegraph and telephone across state lines to the Home Office at Newark, New Jersey, where they are considered and acted upon, and where all contracts and policies are executed and issued (R. 3, 13). After issuance, the policies of insurance and annuity contracts are transmitted from Appellant's Home Office across state lines to its respective agents for delivery to the insured (R. 3, 13). The Appellant paid in 1944 for the use of facilities of interstate commerce the sum of approximately $1,277,000. covering postage, telephone, telegraph and express services. (R. 4, 13.) It also paid that year the sum of approximately $475,000. for traveling expenses. (R. 4, 13.)

Finally, the Court in the *South-Eastern Underwriters* case referred on page 541 to the "continuous and indivisible stream of intercourse among the states composed of collection of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts." The same "continuous and indivisible stream of intercourse

among the states'' exists in this case, for, as above set forth, the nationwide operation of the Appellant's insurance business in all its manifold phases requires the movement of information, documents and money on a large scale across state lines. The same situation exists in South Carolina, where the Appellant conducted its business in 1944 through four district offices and twenty-one agents. (R. 5, 13.) During that year the Appellant issued from its home office 1439 policies insuring the lives of approximately 1000 persons resident in the state for a total amount of $1,475,062.00 and paid claims in the amount of $457,602.28. (R. 5, 13.) The Appellant on December 31, 1944, had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in South Carolina for a total amount of $30,827,184. (R. 5, 13.) The transactions involved in all these policies were an integral part of a "continuous and indivisible stream of intercourse among the states."

Likewise matters of banking and advertising (essential factors of the insurance business) not only are of considerable magnitude but form a part of the great stream of interstate commerce. The Appellant maintains throughout the United States and the Dominion of Canada, subject to the control of its Board of Directors and executive management at Newark, New Jersey, cash balances in 514 banks and trust companies. (R. 4, 13.) Each year it spends large sums of money in national advertising, and during 1944 for example, expended approximately $475,000. for advertising in magazines circulating throughout the United States and approximately $900,000. in radio programs broadcast throughout the nation (R. 4, 13).

No other branch of commerce is more fundamentally interstate in its nature than insurance. The very rates upon which it subsists are established not on the experience of one state but on the average of all states. The law of averages and the theory of diversification and distribution of risk are the basis of the business of life insurance. The insurance written in the Appellant's home state is small in

comparison to its interstate business which produces the majority of its premium income.

Even as to the few activities which the state might maintain were local in character, such as the collection of premiums, medical examinations, and the like, it is impossible to divorce such activities from the extra-state aspects since they are but local incidents of the "continuous and indivisible stream" of interstate commerce managed and supervised from the Appellant's home office in New Jersey. While the minor activities of local agents in the conduct of Appellant's business (when separated from the other aspects of the Appellant's business) might superficially appear to be of a local nature, they are not so, and especially when their relationship to other aspects of the company's insurance business is analyzed. As stated by Mr. Justice Black in the *South-Eastern Underwriters* case:

> "Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business." (p. 541)

The Court must examine the entire transaction of which such local activities are "but a part, in order to determine whether there may be a chain of events which becomes interstate commerce."

> "In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce." (p. 547)

Thus there can be no questioning that in accordance with the holding in the *South-Eastern Underwriters* case, as well as in fact, the Appellant's business in South Carolina clearly constitutes interstate commerce.

II. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES IN THAT THEY ILLEGALLY DISCRIMINATE AGAINST APPELLANT'S INTERSTATE INSURANCE BUSINESS IN SOUTH CAROLINA.

(*Assignments of Error Nos. 3 and 10*)

Sections 7948 and 7949, which are set forth verbatim in the Appendix hereto (pages 61-64), provide, in substance, as follows:—

Section 7948.

"*In addition to the annual license fees now provided by law,* the commissioner shall require each *foreign life insurance company* . . . to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i. e., total premium income or total premium receipts from the State," less dividends and bonuses paid to residents of the state, but with the further provision if the foreign insurance company invest in certain South Carolina securities or property to the extent of at least one-quarter of the reserve on all policies issued in South Carolina, then the rate shall be one and three-fourths per cent; "if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent." Other types of insurance companies are required to make similar payment. If a return is not made, "the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the

State to collect any unpaid portion of license fees." (Italics ours.)

Section 7949.

"The Insurance Commissioner of South Carolina is hereby directed to require all *insurance companies* doing business in this State, including all domestic companies . . . of any class licensed by such insurance commissioner and not incorporated under the laws of South Carolina, to pay, in addition to the annual license fee now provided by law, a graduated licensed fee in an amount equal to one (1%) per cent of the total premiums collected in the State, less return premiums for cancellations on risks: PROVIDED, that the terms hereof shall not apply to domestic insurance companies; * * *"

"This Section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws but is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes." (Italics ours.)

These two sections upon examination disclose a "calculated discrimination against foreign commerce" and, are unconstitutional because they violate the commerce clause.

Section 7948 provides that the Appellant, a *foreign* life insurance company, must pay, *in addition to the annual license fees now required by law,* an additional tax in an amount equal to two per cent of the premiums received by Appellant from its insurance business in South Carolina during the preceding year less certain deductions if Appellant had invested portions of its reserve in South Carolina securities or property.

Section 7949 imposes an *additional* tax on all insurance companies, *except domestic insurance companies,* in an amount equal to one per cent of the premiums received in South Carolina during the preceding year.

Thus the gross premium tax to which foreign insurance companies, like the Appellant, are subjected and from which domestic insurance companies are specifically exempt, amounts to three per cent of the premiums received in South Carolina in the preceding year, which tax can only be reduced fractionally as aforesaid.

It is thus evident on the face of the very statutes themselves that foreign insurance companies are subjected to a very real and substantial discrimination in their local competition with South Carolina domestic insurance companies —an economic disadvantage in the form of a protective tariff which the several states have been prohibited by the commerce clause from imposing on foreign companies engaging in interstate commerce.

That there is discrimination is, also, established by the pleadings. Appellant alleged in paragraph twelve of its Petition for Injunction and Equitable Relief that:

> "The taxes provided for under Sections 7948 and 7949, referred to in the two preceding paragraphs, are levied solely against foreign Insurance Companies, domestic Insurance Companies being specifically exempted therefrom; and there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of." (R. 6.)

The Insurance Commissioner, in his Return to Rule to Show Cause and Reply to the Petition, did not deny the aforesaid allegations which had the effect of an admission and further, he affirmatively alleged in paragraph four of his Return as follows:

> "Replying to the allegations of the 12th paragraph of the petition, the respondent, D. D. Murphy, Insurance Commissioner of the State of South Carolina, admits that the State of South Carolina, acting within its sovereign capacity as a state and in the exercise of its police power, has under the provisions of Sections 7948 and 7949 of the Code of Laws of South Carolina,

1942, levied upon the petitioner, and all foreign insurance companies seeking to do business in the State of South Carolina, as a class, the tax therein provided for as a condition precedent to their being permitted to conduct an insurance business within the State. He admits further that said tax is not levied upon domestic insurance companies of this state, which companies constitute an entirely different class from that of foreign insurance companies doing business in this state." (R. 14.)

Not only is discrimination apparent on the face of the statutes and the pleadings but it is also apparent from a comparison of the taxes which the Appellant has to pay with the taxes paid to the State of South Carolina by the five largest South Carolina domestic life insurance companies. These figures are tabulated in a schedule which was attached to Appellant's Petition for Injunction and Equitable Relief as "Exhibit A." This schedule is not only found on page 10 of the Record but is also reprinted as a footnote on page 8 of this brief.

According to this schedule in 1944 the Appellant and the five South Carolina companies received premiums on insurance written in that state in the following amounts:

The Prudential Insurance Company of America	$876,305.61
Liberty Life Ins. Co.	6,164,600.50
Carolina Life Ins. Co.	2,028,153.03
Atlantic Coast Life Insurance Company	1,182,037.72
Palmetto State Life Insurance Company	1,060,275.58
Capitol Life and Health Insurance Company	783,675.84

The Appellant paid a premium tax of $19,676.94. The five South Carolina companies were completely exempt and paid no premium tax. If these South Carolina companies paid similar gross premium taxes, they would have been required to pay, respectively, $184,938.02, $60,844.59, $35,461.13, $31,808.27, and $23,510.28, less the statutory pro-

portionate deductions if the reserves were invested in South Carolina securities or property.

Similarly, as shown in said schedule, the Appellant paid in 1943 a premium tax of $18,496.87 while the aforesaid South Carolina companies paid no premium tax.

The discrimination has required the Appellant to pay the aforesaid taxes while South Carolina companies make no corresponding payment.

The foregoing demonstrates the existence of the discrimination and its amount against Appellant, and in favor of the South Carolina domestic insurance companies. The impact of the ultimate burdens (and benefits) of the discrimination is made clear by the following: Under the accounting practices prescribed by the various state insurance commissioners, premium taxes are uniformly treated as a general operating expense. This means that all premium taxes paid to all states in which a company may be doing business are aggregated and distributed pro rata to all those entitled to the "equity" in the company, i. e., in a mutual company they appear as a factor increasing the cost of insurance to all the policyholders; and in a stock company they appear as a factor reducing dividends to stockholders. South Carolina, by discriminating as she has, therefore increases the cost of insurance to all policyholders, wherever resident and including South Carolinians, who place their insurance with an out-of-state company; and on the other side, increases the profits available for dividends of the South Carolina companies, most of which are stock companies.

This Court has repeatedly held that the several States may not enact legislation which discriminates against interstate commerce and in favor of local or intrastate commerce.

The commerce clause, which carries an implied prohibition against state legislation discriminating against interstate commerce, was inserted in the Constitution to remedy one of the great and glaring weaknesses of the Confedera-

tion, i. e., the commercial rivalry among the states which threatened to destroy the new Nation through taxes and trade barriers discriminating against commerce of the sister states and in favor of local commerce.

> "We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation'. Farrand, Records of the Federal Convention, vol. II, p. 308; vol. III, pp. 478, 547, 548; The Federalist, No. XLII; Curtis, History of the Constitution, vol. 1, p. 502; Story on the Constitution, § 259." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935).

See also *Welton v. The State of Missouri*, 91 U. S. 275, 280, (1875).

Thus, the commerce clause (which carries an implied prohibition against state legislation discriminating against the commerce of other states) was incorporated into the Constitution for the purpose of remedying one of the defects of the Confederation. As stated by James Madison, want of authority in Congress had led to an exercise of power separately by the states which not only proved abortive but engendered rival, conflicting, and angry regulations. Moreover, while no mention of discrimination can be found in the debates of the Constitutional Convention, it seems quite clear that the object and result of inserting the supremacy clause in the Constitution was to make it impossible for a state to encroach on the legislative right of the national government and that the insertion of the clause rendered unnecessary the actual writing of a prohibition into the commerce clause for the protection of that government prerogative.

> "The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the peo-

ple of more states than one;—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.". *United States v. South-Eastern Underwriters Association*, supra at 552.

In *Best & Company, Inc. v. Maxwell*, 311 U. S. 454, 455 (1940) Mr. Justice Reed in an unanimous decision declared that "the commerce clause forbids discrimination, whether forthright or ingenious" and cited in support thereof the cases of *Welton v. The State of Missouri, supra; Guy v. Baltimore*, 100 U. S. 434 (1879); *Webber v. Virginia*, 103 U. S. 344 (1880); *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887).

A review of some of those and other leading cases will show conclusively that "the commerce clause forbids discrimination" and that a statute which discriminates against interstate commerce is unconstitutional.

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), a New York statute prohibited the sale of milk imported from another state unless the milk dealer first obtained a license. To get this license the milk dealer had to sell the imported milk at the same price as established for milk produced in New York. The statute was held unconstitutional. Mr. Justice Cardozo pointed out that the statute could not be sustained as a valid exercise of police power and that interstate commerce was unjustly discriminated against, saying on page 527:

"Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against com-

petition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result."

Later in *Hale v. Bimco Trading Co.*, 306 U. S. 375 (1939), this Court considered the constitutionality of a Florida statute which imposed an inspection fee upon imported cement from which inspection and fee domestic cement was exempt. The inspection fee was admittedly found to be sixty times greater than the actual cost of inspection. Although the alleged purpose of the statute, as set forth in the preamble of the statute, was to keep inferior cement out of the state for the protection of domestic cement, this Court held that there was no justification for such discriminatory action against foreign cement, saying through Mr. Justice Frankfurter on page 380:

"That no Florida cement needs any inspection while all foreign cement requires inspection at a cost of fifteen cents per hundredweight is too violent an assumption to justify the discrimination here disclosed. The other justification—the competitive effect of foreign cement in the Florida market—is rather a candid admission that the very purpose of the statute is to keep out foreign goods. The Supreme Court of Florida gives no reason resting in local conditions for what appears to be a transparent discrimination in the imposition of heavy inspection fees as between imported and domestic cement, and none has been offered by appellants. The context of a particular statute may justify distinctive treatment of phases of interstate or foreign commerce. The circumstances may negative apparent discrimination in the difference of treatment. . . . According the statute every presumption of

validity, no reasonable conjecture can here overcome the calculated discrimination against foreign commerce.

". . . But it would not be easy to imagine a statute more clearly designed than the present to circumvent *what the Commerce Clause forbids.*" (Italics ours.)

Best & Company, Inc. v. Maxwell, 311 U. S. 454 (1940), was an appeal from the Supreme Court of North Carolina wherein that court had denied the petition for refund filed by a New York merchandise establishment. The state had levied an annual privilege tax of $250. on every person, not "a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders." North Carolina merchants doing similar business were only required to pay an annual tax of $1.00. The statute was discriminatory against interstate commerce and, therefore, in violation of the commerce clause, which, as stated by Mr. Justice Reed, "forbids discrimination, whether forthright or ingenious." (p. 455)

More recently in *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174, 182 (1942), Mr. Justice Frankfurter in a concurring opinion stated:

> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: (1) no State can, without the consent of Congress, lay any imposts or duties on imports or exports, except as necessary for executing its inspection laws, Art. I, § 10 [2]; (2) no State can, without the consent of Congress, lay any tonnage duties, Art. I, § 10 [3]; and (3) ***by virtue of the Commerce Clause, Art. I, § 8 [3], no State can tax so as to discriminate against interstate commerce.***"

See also *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 45, 48 (1940), where the present Chief

Justice in summarizing what taxes were permissible and what not under the commerce clause said:

> "Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared or in competition with intrastate commerce, and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states." (p. 45). . . .
>
> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce." (p. 48)

In *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938), Mr. Chief Justice Stone made the following pertinent statement when considering the constitutionality of a South Carolina statute which regulated the weight of motor trucks, which statute was deemed a valid exercise of the state's police power:

> *"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have*

recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. Robbins v. Shelby County Taxing District, 120 U. S. 489, 498; Caldwell v. North Carolina, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See Gibbons v. Ogden, 9 Wheat. 1, 187; Brown v. Maryland, 12 Wheat. 419, 438-439; Cooley v. Board of Port Wardens, supra . . ." (Italics ours.)

In *Southern Pacific Company v. State of Arizona,* — U. S. —, 65 Sup. Ct. 1515 (1945), a case involving the constitutionality of an Arizona statute which limited the number of passenger and freight cars on trains operating in that state, Mr. Justice Douglas stated:

> "My view has been that the court should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted." (p. 1532.)

Mr. Justice Black in his dissent in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 455 (1939), a case involving the constitutionality of a Washington state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to places of sale in other states, stated:

> "I would return to the rule that—*except for state acts designed to impose discriminatory burdens on interstate commerce* because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.'" (Italics ours.)

While it may be argued that the tax is not a burden upon interstate commerce and not discriminatory by reason

of the fact that the tax has been in effect for a number of years and the Appellant has been able to do an expanding business notwithstanding the fact, such argument is not an answer to the unconstitutionality of the statute. As stated in *In re: Insurance Tax Cases*, 160 Kans. 300, 326, 161 P. (2d) 726, 742 (1945) (dissenting opinion):

> "Certainly a discriminatory burden imposed upon only one of two competitors does not cease to be discriminatory merely because he is able to bear it and even to do well in spite of it. Either he must do business on a narrower margin, or compensate by some cut in operating cost, or by some added inducement manage to pass the burden on to his customer. *Equality of treatment is the test, and not whether a competitor can manage to do business and even prosper in spite of inequality.*
>
> "In this connection it is suggested in the court's opinion that in any event the tax cannot be regarded as a burden upon the plaintiffs because they doubtless take it into account in fixing the premiums and thus pass on to the policyholders whatever burden results from the tax. It is said in the opinion that if the state concludes to exact an indirect tax upon the holders of insurance policies in this manner, for revenue purposes, no reason appears why that cannot be done. The fact that the plaintiffs may be able to pass the burden on to policyholders in Kansas in no way answers the issue of discrimination, under the law. If it did, any discrimination against an interstate competitor would cease to be discrimination if it could be shown that he had succeeded in making his customers bear the burden." (Italics ours.)

Hence, there can be no doubt that the premium tax statutes (Sections 7948 and 7949 of the Code of Laws of South Carolina) are unconstitutional because they in fact discriminate against Appellant's interstate insurance business in South Carolina.

III. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, ARE NOT OFFSET BY ANY CORRESPONDING OR CORRELATIVE TAX OR TAXES NOR CAN THEY BE SUSTAINED AS A PRIVILEGE TAX.

(*Assignments of Error Nos. 2, 8, 9, and 10*)

A. THE PREMIUM TAXES ARE NOT OFFSET BY ANY CORRESPONDING OR CORRELATIVE TAX OR TAXES.

The Supreme Court of South Carolina has indicated in its opinion that the premium tax may not be discriminatory since it says:

> "It should be said for a first ground for refusal of the injunction sought that, upon examination, the license tax . . . may not be as burdensome as first appears, or even at all so, and may, therefore, be also non-discriminatory against a 'foreign' company, such as petitioner, and in favor of a domestic (resident) company, which latter is expressly exempt from this particular tax. In this view, it is neither a burden upon interstate commerce nor discriminatory against a foreign company. Statistics are included in the petition and uncontested by the return which show the amount of the premiums tax paid by petitioner and certain taxes paid by comparable, competing domestic companies, but they confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.,—taxes of a nature which petitioner pays none here which correspond. These petitioner doubtless pays in its home state of New Jersey, but not here, as do the resident companies It does not appear in the record whether the state of New Jersey, has a similar license tax to that of South Carolina (applicable to our and other non-resident insurance companies which may do business there) to which

petitioner now objects, but the tax is not at all uncommon among the states. Annotations, 49 ALR 726, 77 ALR 1490 and 83 ALR 464." (R. 22.)

In answer thereto, Appellant states:

(1) The Supreme Court of the State of South Carolina was foreclosed by the pleadings, and this Court should consider itself foreclosed, from consideration of possible corresponding or correlative taxes;

(2) Even if the question of correlative taxes is open for consideration, the Supreme Court of South Carolina's statement of the facts with respect thereto is contrary to the undisputed evidence;

(3) None of the taxes referred to by the Supreme Court of South Carolina as possible offsetting burdens are actually corresponding or correlative taxes; and

(4) The actual figures in the record with respect to the amount of such taxes demonstrate conclusively that they are insignificant as offsetting factors.

Taking up each of these points separately:

(1) The Supreme Court of the State of South Carolina was foreclosed by the pleadings, and this Court should consider itself foreclosed, from the consideration of any possible corresponding or correlative taxes.

In paragraph twelve of the Petition for Injunction and Equitable Relief it is alleged, after setting forth the premium taxes imposed upon foreign companies, that "there are no other taxes imposed upon domestic Insurance Companies which would off-set the discrimination complained of". (R. 6)

The Insurance Commission has not denied this allegation in his return, and hence, it can and should be considered as admitted.

(2) Even if the question of correlative taxes is open for consideration, the Supreme Court of South Carolina's statement of the facts with respect thereto is contrary to the undisputed evidence.

In the excerpt from the opinion above-quoted, the Court states that the figures shown in Column 5 of Exhibit A to the Petition (set forth on page 10 of the Record and page 8 hereof) "confessedly do not include the property taxes paid by the resident companies on their home office buildings, furniture, equipment, personal property investments, etc.—taxes of a nature which petitioner pays none here which correspond". (R. 22). This is not correct. The figures shown in Column 5 of Exhibit A do include all taxes paid both by the domestic insurance companies and the Appellant, except real estate taxes. Furthermore, the Appellant is subject to all types of taxes in the State of South Carolina to which domestic insurance companies are subject and, in addition, is required to pay the discriminatory premium taxes herein complained of.

While this Court pays great deference to facts found by a state court, as stated by Mr. Chief Justice Stone in *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 659 (1945),

> "When the existence of an asserted federal right or immunity depends upon the appraisal of undisputed facts of record, or where reference to the facts is necessary to the determination of the precise meaning of the federal right or immunity, as applied, we are free to reexamine the facts as well as the law in order to determine for ourselves whether the asserted right or immunity is to be sustained. *Kansas City Southern R. Co. v. Albers Commission Co.*, 223 U. S. 573, 591; *Truax v. Corrigan*, 257 U. S. 312, 325; *First National Bank v. Hartford*, 273 U. S. 548, 552, and cases cited; *Fiske v. Kansas*, 274 U. S. 380, 385-386; *Norris v. Alabama*, 294 U. S. 587, 589-590."

(3) None of the taxes referred to by the Supreme Court of South Carolina as possible offsetting burdens are actually corresponding or correlative taxes.

It is well established that only corresponding or correlative taxes may be considered in determining whether discrimination in fact exists under a state tax statute.

In *Hinson v. Lott*, 8 Wall. 148 (1868), this Court considered the constitutionality of an Alabama statute which imposed a tax of fifty cents per gallon on whiskey imported for sale in Alabama even though the sale was made in the original package. The Court held that the commerce clause was not violated since there was a corresponding tax of fifty cents per gallon on whiskey manufactured within the state. In other words, for such a statute to be non-discriminatory the other taxes which would eliminate the discrimination of what would otherwise be a discriminatory tax must be "complementary" to the tax under consideration, or, as Mr. Justice Miller expressed it, the tax merely subjects the interstate commerce "to the same rate of taxation which similar articles pay that are manufactured within the State."

See also *Woodruff v. Parham*, 8 Wall. 123 (1868).

Likewise in *Henneford v. Silas Mason Co., Inc.*, 300 U. S. 577 (1937), this Court held constitutional a use tax which the State of Washington imposed upon the use in Washington of products purchased outside the state. The tax was equal to the sales tax which was imposed upon intrastate sales of such commodities in Washington. Since the use tax was complementary to the sales tax, the use tax was considered non-discriminatory. As Mr. Justice Cardozo stated, "Equality is the theme that runs through all the sections of the statute." That theme is entirely lacking in Sections 7948 and 7949 of the South Carolina Code of Laws now under review, since domestic insurance companies pay no premium taxes.

In *Best & Company, Inc. v. Maxwell*, 311 U. S. 454 (1940), Mr. Justice Reed stated on page 456:

"The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business."

Foreign companies as well as domestic companies are subject to *ad valorem* property taxes on their real estate and tangible property within the state, but such taxes are not corresponding or correlative taxes in determining whether discrimination exists against interstate commerce. Otherwise this Court would undoubtedly have considered them in the *Best & Company, Inc.*, case.

Ad valorem taxes on tangible property are imposed in return for the protection and benefits accorded its owner by the state. *Union Refrigerator Transit Company v. Kentucky*, 199 U. S. 194 (1905). They bear no relationship to the conduct of a business of insurance like the "premium tax" does. Nor do real estate taxes necessarily bear any relation to the business of insurance, for some companies may own much real estate and others very little and still conduct the same amount of insurance business in a state. Moreover, both foreign and domestic companies must pay real estate taxes on the real estate owned in South Carolina as well as *ad valorem* taxes on tangible personal property. The Appellant is not exempt from this taxation, but, as set forth in the aforesaid Schedule, it paid in South Carolina in 1944 *ad valorem* taxes in the amount of $3,103.92. Like the South Carolina domestic companies, the Appellant pays similar taxes in its home state of New Jersey. *Ad valorem* taxes should not be considered in determining the question of discrimination.

The Supreme Court of South Carolina, therefore, erred in stating that *ad valorem* property taxes paid by domestic insurance companies would offset the discrimination apparent on the face of Sections 7948 and 7949 so as to make the taxes under these sections non-discriminatory.

While other taxing statutes may be considered in determining whether in fact discrimination exists, as in *General American Tank Car Corp. v. Day*, 270 U. S. 367 (1926),

and *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245 (1928), the taxing statutes must be complementary one to the other in that each is a part of a statutory plan of taxation. No such taxing statutes exist in South Carolina.

(4) The actual figures in the record with respect to the amount of such taxes demonstrate conclusively that they are insignificant as offsetting factors.

The following table shows all the taxes of all types imposed in South Carolina upon the insurance companies named in Exhibit A.

	Column 1 1944 South Carolina Premiums Column #1 Schedule T Life and Casualty
The Prudential Company of America	$ 876,305.61
Liberty Life Ins. Co.	6,164,600.50
Carolina Life Ins. Co.	2,028,153.03
Atlantic Coast Life Insurance Company	1,182,037.72
Palmetto State Life Insurance Company	1,060,275.58
Capitol Life and Health Insurance Company	783,675.84

(See footnote 5.)

5. All the figures shown in the foregoing table are taken from the pleadings in the case except Column 3, the real estate taxes. The question of real estate taxes was raised by the Supreme Court of South Carolina, and in order that all of the facts with reference thereto should be in the record, the Appellant promptly presented to that Court a motion for an order permitting Appellant to file a statement of the real estate taxes paid in South Carolina by the aforesaid five South Carolina domestic insurance companies. That motion set forth the figures set forth in Column 3 but the Supreme Court erroneously denied that motion.

Column 2	Column 3	Column 4	Column 5
All Taxes Other Than Real Estate	Real Estate Taxes	Total of Column 2 and Column 3	Percentage of Column 4 to Column 1
$22,780.86	$ —0—	$22,780.86	2.6%
13,178.40[6]	4,151.02	17,329.42	0.3
12,171.75[6]	6,486.92	18,658.67	0.9
1,618.35	6,506.49	8,124.84	0.7
5,960.30	3,258.11	9,218.41	0.9
2,975.18	1,162.23	4,137.41	0.5

6. Note should be taken of the large amount of "other taxes" paid by these two South Carolina domestic companies. As it is known that these two companies do a substantial business outside of South Carolina, it would appear that a considerable portion of these "other taxes" are really paid to states other than South Carolina—and may possibly be premium taxes in other states.

The mere reference to and analysis of the above table demonstrates beyond question that even giving full effect to every tax, whether considered as corresponding, correlative or otherwise, the discrimination against the appellant is overwhelming.

B. SECTIONS 7948 AND 7949 OF THE CODE OF LAWS OF SOUTH CAROLINA, 1942, ARE NOT PRIVILEGE TAXES.

We have stated that the sole issue in the case is the power of South Carolina to discriminate against interstate commerce. We should, however, call the Court's attention to an additional issue arising out of the following allegation in Paragraph Third of Appellee's Return to the Rule to Show Cause:

> "All foreign insurance companies, as a class, are required to pay the tax on premiums collected in this state. The State, in the exercise of its police power, placed said tax upon the petitioner and all other foreign insurance companies as a prerequisite to extending to them the privilege of doing business in this State. Without the payment of this excise tax the petitioner is without authority to conduct any business within the State of South Carolina." (R. 14.)

and in Paragraph Fourth it is alleged that the tax is assessed:

> "as a condition precedent to their being permitted to conduct an insurance business within the State." (R. 15.)

The Supreme Court of South Carolina evidently adopts with approval this construction of the South Carolina premium tax statutes as is indicated by its discussion of the rule stated in the leading case of *Crutcher v. Kentucky*, 141 U. S. 47 (1891) (beginning at R. 26). The Supreme Court of South Carolina is clearly in error because the right to carry on interstate commerce is not a franchise or privilege which may be granted or withheld by a state and no

state may levy a tax upon the exercise of such privilege. *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Western Union Telegraph Company v. Kansas*, 216 U. S. 1 (1910); *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282 (1921); *International Textbook Co. v. Pigg*, 217 U. S. 91 (1910); *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U. S. 90 (1937); *Fisher's Blend Station, Inc., v. State Tax Commission*, 297 U. S. 650 (1936).

IV. THE McCARRAN-FERGUSON ACT WAS NOT INTENDED TO PERMIT, NOR COULD IT VALIDLY PERMIT, DISCRIMINATORY REGULATION OR TAXATION OF INTERSTATE COMMERCE.

(Assignments of Error Nos. 4, 5, 6, 7 and 10)

Subsequent to the decision of the *South-Eastern Underwriters* case, Congress enacted the McCarran-Ferguson Act of March 9, 1945, c. 20, 59 Stat. 34; 15 U. S. C. A. §§ 1011-1015. The pertinent provisions of this Act are:

> "Sec. 1. Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."
>
> "Sec. 2 (b) "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business unless such Act specifically relates to the business of insurance: . . ."

Although the Supreme Court of South Carolina held in this case that the South Carolina premium tax law is

neither a burden upon interstate commerce nor discriminatory against a foreign insurance company, it further erroneously construed the above Act as a cure-all for the invalidity, if any, of its state premium tax statutes and held that, without more, the McCarran-Ferguson Act would enable the state to continue to levy the discriminatory tax against the interstate commerce of the Appellant.

A consideration of the Act, the circumstances surrounding its enactment, and the decisions of this Court with respect to the "Silence of Congress Doctrine" and "Congressional Consent Doctrine" show that the McCarran-Ferguson Act was not intended to and does not in terms authorize burdensome and discriminatory taxation or regulation of insurance companies by the several states.

What were the circumstances which attended the enactment of the McCarran Act?

> "By the Southeastern decision—which was described in the report of the Judiciary Committee of the United States Senate as a 'precedent-smashing decision'—the Supreme Court held that the business of insurance is not only commerce but, as conducted by the larger companies, it is *interstate commerce*, and therefore subject to Federal regulation; also, that since the Sherman Act is framed in general terms and carries no provision exempting it, insurance business is subject to its prohibitions and penalties. In order to allay alarm and lessen confusion as to the effect of the decision, the McCarran Act was passed. Obviously congress could not overrule the finding that such insurance business constitutes interstate commerce. That question is for judicial and not for legislative determination. But congress could determine to what extent the field should be entered by the federal government." *In re Insurance Tax Cases*, 160 Kans. 300, 329, 161 P. (2d) 726, 743 (1945) (dissenting opinion).

Senator McCarran, the sponsor of the bill, stated in the course of the proceedings on the bill:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, *subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court*, as, for instance, in Allegeyer v. Louisiana (165 U. S. 578); St. Louis Cotton Compress Co. v. Arkansas (260 U. S. 346); and Connecticut General Insurance Co. v. Johnson (303 U. S. 77)." (Italics ours.) 91 Cong. Rec., Feb. 26, 1945, at 1471.

Senator McCarran, it will be noted, stated that continued regulation and taxation by the states should be "subject, always, however, to the limitations set out in the controlling decisions of the United States Supreme Court." The decisions cited by way of illustration involved the invalidation of state laws affecting insurance operations under the "due process" clause of the Fourteenth Amendment.

Inasmuch as the decisions of this Court relative to the validity of state taxation under the commerce clause became, upon the rendition of the *South-Eastern Underwriters* decision, controlling decisions bearing upon the continued regulation and taxation of insurance companies by the states, presumably it was the intention of the sponsors of the bill that the decisions of this Court should likewise be recognized in the continued exercise of the taxing and regulatory powers of the states.

Senator O'Mahoney, another proponent of the bill, stated that the bill was not intended to "delegate to any State the power to legislate in the field of interstate and foreign commerce," and that the Conference Report "would give to the States, to the Congress and to industry the opportunity so to adjust the laws and insurance practices as to

bring clarity into the whole situation * * * an invitation to the States to legislate in good faith." 91 Cong. Rec., Feb. 27, 1945, at 1554 and 1557.

The Act.

What does the Act state?

The pertinent provisions have been fully set forth, *supra*. Analyzing its provisions, we fail to see any intention on the part of Congress, either expressed or implied, to validate, authorize, or sanction state statutes which discriminate against interstate commerce. The manifest purpose of the Act was to permit the states to continue with such regulation and taxation of the business of insurance as was constitutional and was not discriminatory against interstate commerce. In other words, Congress by the enactment of the McCarran-Ferguson Act intended to remove any question as to the validity of non-discriminatory state regulation and taxation which under the so-called "Silence of Congress Doctrine" might otherwise be deemed invalid.

The Silence of Congress and Congressional Consent Doctrines.

The doctrine commonly known as Silence of Congress stands for the proposition that if Congress has not legislated concerning a matter of local concern which incidentally affects interstate commerce, then that matter may be regulated by the several States, subject only to being superseded by Congressional legislation; but, if the matter is of national concern and such as to require uniform regulation, then that matter shall be regulated exclusively by Congress.

The McCarran-Ferguson Act, as stated in Section 1, was enacted so as to permit "the continued regulation and taxation by the several States of the business of insurance" and also to preclude "silence on the part of Congress" to be "construed to impose any barrier to the regulation or taxation of such business by the several States".

We are of the opinion that what Congress intended to say in the McCarran-Ferguson Act was that its silence or failure to regulate the interstate insurance business was not to be taken as meaning that the business should be free from all regulation or taxation by the several states. To make its meaning doubly clear Congress provided in Section 2 (a) "that the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business," that is, regulation and taxation which did neither impose an undue burden on interstate commerce nor discriminate against the interstate business of foreign insurance companies.

The cases concerning the doctrine of Silence of Congress and those concerning Congressional Consent support that construction of the McCarran-Ferguson Act.

The first and one of the leading cases on this subject is *Cooley v. Wardens of the Port of Philadelphia,* 12 How. 299 (1851). The question in that case involved the validity of a statute of Pennsylvania which required certain ships, sailing from or bound to ports not within the Delaware River, to receive a pilot, and imposing penalties upon the master of any vessel who failed to take a pilot. It was contended that this act was a regulation of commerce and, therefore, void. From the adoption of the Constitution similar statutes enacted by the states had been in existence and had been enforced; and Congress, shortly after the adoption of the Constitution, had enacted in 1789 a statute declaring that all pilots in the harbors, rivers and ports of the United States should continue to be regulated in conformity with the existing laws of the states where such pilots might be, or with such laws as the states might thereafter enact for the purpose, until further legislative provision should be made by Congress. The Court stated that if, under the Constitution, Congress had exclusive power to regulate the subject of pilotage, it was without power to permit the states to make such regulations; but that if the regulation of pilotage, while affecting interstate commerce

and within the power of Congress, was a matter of local concern, the subject could be regulated by the states. The Court held the regulation was of the latter character, and it was upheld.

The Court, in its decision, concluded: (1) That matters of local concern which incidentally affect interstate commerce may still be regulated by the states, although such regulation may be superseded by Congressional regulation; (2) That if the nature of the subject was such as to require uniform regulations, that is, of national concern, the power to regulate was exclusive in Congress and did not reside in the states, whether or not Congress had legislated on the subject; and (3) That Congress has no power to grant to the states any legislative power which had been surrendered by them and granted exclusively to Congress.

The mooted questions which followed this decision were whether a subject was "national" or "local" in nature and then whether the question should be determined by Congress or the courts. Whatever the correct view may be on the latter question, it is clear from the decision that the matter of the "silence of Congress" came to have significance because of the distinction as to whether subjects of regulation were national or local in nature. In the former case, the courts thereafter held that the states could not interfere at all, even in the silence of Congress, while, in the latter, the state might exercise a regulatory power so as to affect interstate commerce, until Congress had occupied the field.

Thus, in *Welton v. The State of Missouri*, 91 U. S. 275, 282 (1875) the Court in holding invalid a Missouri tax on vendors of foreign-made goods, stated:

> "Its (Congress') inaction on this subject . . . is equivalent to a declaration that the inter-State commerce shall be free and untrammeled."

Similarly, in *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493 (1887) the Court said:

> "That where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom."

Complementary to the Silence of Congress Doctrine is the doctrine which has been designated as Congressional Consent. What is the effect of congressional action where Congress, instead of remaining silent, has endeavored to consent to regulation and taxation by the several states? That question is squarely raised in this case because of the Congressional consent referred to in the McCarran-Ferguson Act. Was not that Act intended only to permit the states to legislate in connection with the regulation and taxation of insurance companies provided such legislation did not burden or discriminate against the interstate business of those companies?

The principal litigation in connection with this body of law has arisen from congressional statutes designed to enable the states to legislate in a fashion otherwise judicially denied to them. The Wilson Act,[7] the Lacey Act,[8] the Hawes-Cooper Act,[9] the Renovated Butter Act,[10] the Webb-Kenyon Act [11] and the Ashurst-Sumners Act [12] were passed for that purpose.

A review of some of the decisions construing these Acts may be helpful.

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7. Wilson Act, Act of August 8, 1890, c. 728, 26 Stat. 313; 27 U. S. C. A. § 121.

8. Lacey Act, Act of May 25, 1900, c. 553, § 5, 31 Stat. 188; 18 U. S. C. A. § 395.

9. Hawes-Cooper Act, Act of January 19, 1929, c. 79, §§ 1, 2, 45 Stat. 1084; 49 U. S. C. A. § 60.

10. Renovated-Butter Act, Act of May 9, 1902, c. 784, § 1, 32 Stat. 193; 21 U. S. C. A. § 25.

11. Webb-Kenyon Act, Act of March 1, 1913, c. 90, 37 Stat. 699; 27 U. S. C. A. § 122.

12. Ashurst-Sumners Act, Act of July 24, 1935, c. 412, § 1, 49 Stat. 494; 18 U. S. C. A. § 396b.

The first state prohibition laws to be construed by this Court involved the question of state power over interstate commerce during the "silence" of Congress. In *Leisy v. Hardin*, 135 U. S. 100, 124 (1890) the Court held invalid a state seizure of liquors under a state law as applied to liquors which were still in interstate commerce and that up to the time of sale "in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

Within a short time thereafter, Congress, by the passage of the Wilson Act subjected liquor coming into a state for sale, storage, or use, to the operation of state laws, even though in the original packages. This Act was held valid in *In re Rahrer*, 140 U. S. 545 (1891).

Later, in *Rhodes v. Iowa*, 170 U. S. 412 (1898) the Court held that the Wilson Act was not intended to permit a state to exclude incoming shipment of intoxicating liquor. Possibly because of the doubt that a federal law permitting the states to forbid the introduction of liquor would be constitutional, the Webb-Kenyon Act was passed, taking the form of a statute prohibiting the shipment of intoxicating liquors into a state for use in contravention of its laws. This law was held to validate state laws prohibiting the shipment of intoxicating liquor into the state, thus settling the issue in *Rhodes v. Iowa, supra*, and establishing the proposition that Congress does have *some* power to remove from the states disabilities which, in the absence of congressional action, inhibit the states in the regulation of interstate commerce. *Clark Distilling Company v. Western Maryland Railway Company*, and *State of West Virginia*, 242 U. S. 311 (1917).

The Hawes-Cooper Act which subjected prison-made goods in their original packages to the operation of state laws on their coming to rest in the state was upheld in *Whitfield v. State of Ohio*, 297 U. S. 431 (1936). This Act (which was similar to the Wilson Act which, as afore-

mentioned, was subsequently supplemented by the Webb-Kenyon Act) was also later supplemented by the so-called Ashurst-Sumners Act which latter Act was upheld in *Kentucky Whip & Collar Co. v. Illinois Central Railroad Co.*, 299 U. S. 334 (1937). In both of these cases reference was made to the fact that the state statutes were non-discriminatory, applying the same rule to goods in interstate commerce as applied to domestic goods. In the *Whitfield case* the Court said on page 439:

> "A state basing its legislation upon that conception has the right and power, so far as the federal Constitution is concerned, by *non-discriminating legislation*, to preserve its policy from impairment or defeat, by any means appropriate to the end and not inconsistent with that instrument." (Italics ours.)

In the *Kentucky Whip & Collar Co.* case the Court cited with approval the *Whitfield* case, saying on page 351:

> "The Court upheld the power of the State, so far as the Federal Constitution is concerned, to base *non-discriminatory legislation* upon that conception." (Italics ours.)

Not only were the statutes respecting prison-made goods non-discriminatory but the cases construing these statutes held that the subjection of such goods to the operation of state statutes did not result in the validation of the state statutes by reason of a delegation of power by Congress, but rather that the reserved police power of the state was broad enough in scope to apply to interstate goods. This broad power of the state was only qualified by the established rule that, in the absence of Congressional action, it might not be exercised so as to interfere with interstate commerce, since Congress by its silence impliedly indicates that such commerce must be free. As stated in *Whitfield v. State of Ohio, supra*, at page 441:

> "That the Hawes-Cooper Act does not constitute a delegation of Congressional power to the state is made

clear by *In re Raher, supra*, pp. 560-561, and by what we have already said under subdivision 2."

International Shoe Co. v. State of Washington, — U. S. —, 66 Sup. Ct. 154 (1945) is the most recent case in which a statute dealing with Congressional consent was before this Court, to wit, the provision in Federal Unemployment Tax Act (Act of August 10, 1939, c. 666 § 613, 53 Stat. 1391; 26 U. S. C. A. § 1606 (a)) making state unemployment statutes applicable to persons engaged in interstate commerce.

While it was recognized in the *International Shoe Co.* case that states may be authorized to enact laws which regulate and effect interstate commerce, this Court went no further than to deny to interstate commerce an immunity not enjoyed by local enterprise. In other words, like the statutes concerning liquor and convict made goods, the purpose of Congress was confined to preventing discrimination *in favor* of interstate commerce. The case, therefore, cannot be taken to mean that Congressional consent in general terms is ever to be construed as authorizing state discrimination *against* interstate commerce or that explicit Congressional sanction of state discrimination against interstate commerce is constitutionally warranted.

Other enabling acts of Congress are of little, if any, assistance except to show the fields covered by such legislation. They shed no helpful light on the question herein presented. See the acts respecting the sale of oleomargarine, the transportation of diseased plants (Plant Quarantine Act, Act of April 13, 1926, c. 135, 44 Stat. 250; 7 U. S. C. A. § 161), the transportation of black bass (Act of July 2, 1930, c. 801, 46 Stat. 845; 16 U. S. C. A. § 852) and of prize fight films (Act of June 29, 1940, c. 443, 54 Stat. 686; 15 U. S. C. A. § 1001).

However, from the cases construing statutes which are analogous in that they involve Congressional consent, it is apparent that these statutes did not and do not delegate to the states the right to discriminate against interstate com-

merce, nor are they otherwise violative of the Constitution. On the contrary they in effect constitute regulations by Congress designed to prevent the frustration of valid state *police* regulations through the use of instrumentalities of interstate commerce. In other words, Congress by these statutes removed restrictions on the reserve state police power of the states which might be urged from its silence on that subject matter but in so doing it was not attempting to delegate to the states the right to enact legislation contrary to provisions of the Constitution of the United States, and more particularly the commerce clause of that great document.

The cases furthermore establish the principle that Congress, even if it had intended to do so, could not have invested the states with the power to discriminate against interstate commerce, whether through regulation or taxation. The states were deprived of that power by virtue of the commerce clause itself. *Cooley v. Wardens of the Port of Philadelphia, supra,* established that Congress cannot increase the powers of a state, the Court saying on page 318 thereof:

> "If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate."

In the light of these cases, it is obvious that what Congress was attempting to do in the McCarran-Ferguson Act was to nullify any attempt to construe its "silence" with respect to the interstate business of insurance as an indication on its part that such business should be entirely free from state regulation or taxation. In no prior case has Congress attempted to "construe" its silence, and it is questionable whether its silence is broken by an attempt to put a construction on it. In any event, the text of the Act shows that, at most, it is intended that the "silence" doctrine should not be invoked to strike down continued constitutional regulation by the states. The Act, however, falls

far short of indicating a purpose to sanction discriminatory taxation of interstate commerce in violation of the Constitution.

Scott v. Donald, 165 U. S. 58 (1897) is authority for the construction here urged of the McCarran-Ferguson Act. In that case, the Court held invalid a South Carolina statute which provided in substance that all liquor within the state should be considered contraband, seized, and turned over to a state commissioner who, in turn, was authorized to purchase and dispose of the same through state dispensers, and who was solely authorized to import liquor into the state. This statute was sought to be upheld by virtue of the Wilson Act, which subjected intoxicating liquors imported into a state for use, consumption or storage, on their arrival to the operation and effect of the police powers of the state to the same extent as though produced therein. The Court stated that the Wilson Act was "not intended to confer on any State the power to discriminate injuriously against the products of other States," whose manufacture and use in South Carolina was not forbidden. The state, it said, under the act of Congress could forbid entirely the manufacture or sale of intoxicating liquors, or provide equal regulations for its sale, but, it stated:

> ". . . the State cannot, under the Congressional legislation referred to, establish a system which, in effect, *discriminates* between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." (p. 100.) (Italics ours.)

Thus, following the decision in the *South-Eastern Underwriters* case, Congress had three alternative courses: (a) to take over completely the regulation and taxation of the insurance business; or (b) to do nothing, thereby permitting the inference to be drawn from its silence that all regulation and taxation by the states was forbidden; or (c) to permit regulation and taxation of the business to be continued as in the past, when not beyond constitutional bounds.

To say that Congress, unless it intended to take the third course, did an entirely futile thing, is to deny the existence of the second alternative, which the Act proclaims.

Justice Hoch, in his dissenting opinion in *In re Insurance Tax Cases*, 160 Kans. 300, 329, 161 P. (2d) 726, 743 (1945), has very clearly expressed what the McCarran-Ferguson Act actually did:

> "What, then, did the McCarran Act do? First, as to the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, it provided that they should be applicable, after January 1, 1948, to the business of insurance 'to the extent that such business is not regulated by state laws;' that until January 1, 1948, such acts and 'the Robinson-Patman Anti-discrimination Act should not apply to the insurance business,' but that these provisions should not render the Sherman Act inapplicable 'to any agreement to boycott, coerce, or intimidate.' Further, that no federal act should be construed to invalidate or impair any state regulatory or tax law with reference to the business of insurance unless such federal act 'specifically relates to the business of insurance.' All these and one or two other such provisions were, in effect, simply amendments to the various federal acts which congress, of course, had power to make. They wrote into the federal acts exceptions or provisos, the absence of which in the Sherman Act had been noted in the Southeastern opinion. They thus clarified the scope of existing federal law. In further declaration that congress had not otherwise entered the insurance field now opened to it, it was said in the McCarran Act that 'the continued regulation and taxation by the several states of the business of insurance is in the public interest,' and that 'the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business.' This was a reassuring expression of the congressional attitude

and intention, but it certainly did not delegate to the states—and could not do so—any power which they did not already have. ***It is elementary that the dividing line between state and federal power is fixed in the constitution, as construed by the Supreme Court. If congress could alter that line at will it could by statute nullify the constitution.*** Assuredly congress did not mean to say by the McCarran Act that a state might now impose discriminatory burdens upon interstate commerce or contravene any of the constitutional guaranties. If it had attempted any such thing its effort would, of course, have been futile. In the McCarran Act congress has now clearly said that, except to the extent indicated, it has not entered the field of insurance regulation. And no regulatory state law is now threatened with the contention that it conflicts with federal regulation. Nor is any such state law in danger, *provided, always,* that it does not exceed constitutional limits as judicially determined. I have no notion that the able men who framed the McCarran Act were foolishly saying to the states that as far as the insurance business is concerned they might now pass a discriminatory or otherwise *unconstitutional* statute if they desired to do so." (Italics ours.)

It seems clear, therefore, that silence of Congress, if the McCarran-Ferguson Act had not been passed, might have been construed to prohibit all regulation and taxation of the business of insurance, but, inasmuch as Congress has broken its silence so as to permit regulation and taxation to be continued as in the past, the construction of the Act which allows a field for the operation of *state laws which are not beyond constitutional bounds* is proper and furthermore it avoids a conclusion which would render the Act invalid. A construction raising a constitutional question has always been avoided by the courts: *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *United States v. Standard Brewery Co.*, 251 U. S. 210, 220

(1920); *United States v. LaFranca*, 282 U. S. 568, 574 (1931).

If we assume that the McCarran-Ferguson Act was intended to permit discrimination and that Congress had the power to authorize the states to pass legislation which discriminates against interstate commerce (propositions which we most emphatically deny), it would still have been necessary for the South Carolina legislature to have reenacted Sections 7948 and 7949, or enacted a new statute after the passage of the McCarran-Ferguson Act, in order to make the gross premium taxes applicable in this proceeding. Sections 7948 and 7949 of the Code of Laws of South Carolina, 1942, being unconstitutional, were null and void and in legal contemplation the same as though they had never been passed. As stated by this Court in *Chicago, Indianapolis & Louisville Railway Company v. Hackett*, 228 U. S. 559, 566 (1913):

> "That act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law. *Norton v. Shelby County*, 118 U. S. 425, 442; *Ex parte Siebold*, 100 U. S. 371, 376."

Obviously, Congress is without power to revive a void state statute, and Sections 7948 and 7949, not having been reënacted, are still null and void and of no effect.

The McCarran-Ferguson Act, if construed to permit discrimination, would be invalid.

If the McCarran-Ferguson Act could be construed to permit discrimination, the question of its validity would depend upon the right of Congress either (1) to adopt the legislation of the several states or (2) to consent to discriminatory state legislation.

A mere statement of the first proposition reveals its fallacy and untenability. Such construction is inconsistent

with the principle that an act, if possible, should be construed so as to be constitutional. If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution, (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue *for their own use,* which power is vested exclusively in the states.

Congress does not have the power to consent to state discriminatory legislation against interstate commerce.

That has been the ruling of this Court in cases involving state statutes which discriminate against interstate commerce. Such legislation is beyond congressional consent.

In *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 522 (1935), the Court said:

> "Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' *International Textbook Co. v. Pigg*, 217 U. S. 91, 112."

In *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498 (1887), a Tennessee statute was declared unconstitutional which required drummers to pay a tax for the privilege of soliciting the sale of goods of firms doing business in other states. The Court said:

"This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. . . . It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that lead to it.

"If the selling of goods by sample and the employment of drummers for that purpose, injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And *Congress alone can do it;* for it is obvious that such regulations should be based on a uniform system applicable to the whole country and not left to the varied, discordant, or retaliatory enactments of forty different states." (Italics ours.)

In *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177, 185 (1938), the present Chief Justice made the following pertinent statement when considering the constitutionality of a South Carolina statute which regulated the weight of motor trucks, which statute was deemed a valid exercise of the state's police power:

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without

> *the state.* Robbins v. Shelby County Taxing District, 120 U. S. 489, 498; Caldwell v. North Carolina, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See Gibbons v. Ogden, 9 Wheat. 1, 187; Brown v. Maryland, 12 Wheat. 419, 438-439; Cooley v. Board of Port Wardens, supra; . . ." (Italics ours.)

This interpretation of the commerce clause denying the right of the states to legislate discriminatorily against interstate commerce finds further support from recent expressions by several present members of this Court.

In *Southern Pacific Company v. State of Arizona,* — U. S. —, 65 Sup. Ct. 1515 (1945), a case involving the constitutionality of an Arizona statute which limited the number of passenger and freight cars on trains operating in that state, Mr. Justice Douglas stated:

> "My view has been that the court should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted." (p. 1552.)

Mr. Justice Black in his dissent in *Gwin, White & Prince, Inc. v. Henneford,* 305 U. S. 434, 455 (1939), a case involving the constitutionality of a Washington state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to places of sale in other states, stated:

> "I would return to the rule that—*except for state acts designed to impose discriminatory burdens on interstate commerce* because it *is* interstate—Congress alone must 'determine how far [interstate commerce] . . . shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.' " (Italics ours.)

In *State Tax Commission of Utah v. Aldrich, et al.,* 316 U. S. 174 (1942), Mr. Justice Frankfurter, in a concurring

opinion upholding the application of a Utah inheritance tax law to a non-resident owner of stock of a Utah corporation in summarizing the limitations upon state taxing power state:

> "The taxing power of the States was limited by the Constitution and the original ten amendments in only three respects: . . . (3) by virtue of the Commerce Clause, Art. 1, § 8, [3], *no state can tax so as to discriminate against interstate commerce.*" (p. 182.) (Italics ours.)

This Court's attention is also called to the fact (as set forth on pages 8, 9 and 11 of Appellant's Statement as to Jurisdiction) that as of January 1, 1945, twenty-eight states had in force "premium tax statutes" which, like South Carolina's statute, placed a burden upon and discriminated against interstate commerce. Subsequently twelve [13] of the twenty-eight states (whose statutes were discriminatory in Appellant's opinion) have recently enacted legislation which either completely or practically eliminated the discrimination and three states [14] have enacted legislation which purports to eliminate discrimination but, in the opinion of the Appellant, do not do so. It is, therefore, evident that these states through their legislatures have impliedly acknowledged the unconstitutionality of their previous "premium tax" statutes and of the fact that the McCarran-Ferguson Act never was intended to validate discriminatory "premium tax" statutes. At the present time only sixteen states have discriminatory statutes.

The McCarran-Ferguson Act surely was not intended to permit, nor could it validly permit, discriminatory regulation or taxation of interstate commerce. It was merely intended to remove any question as to the validity of proper and non-discriminatory state regulation and taxation which

13. Arizona, Arkansas, Iowa, Maine, Missouri, New Hampshire, New Mexico, Oregon, South Dakota, Tennessee, Washington and West Virginia.
14. Florida, Oklahoma and Texas.

under the "Silence of Congress Doctrine" might otherwise be deemed invalid and clearly was not intended (nor could Congress have constitutionally done so if it desired) to authorize state legislation which discriminates against the interstate commerce of foreign insurance companies and in favor of local commerce of domestic companies.

CONCLUSION.

This case presents the important constitutional problem whether interstate commerce shall be taxed and regulated by the states on the basis of equality with domestic commerce or whether interstate commerce shall be subjected to all the evils of discrimination which the framers of the Constitution intended to eliminate by the commerce clause.

This Court has ruled in the *South-Eastern Underwriters* case that the business of insurance when transacted across state lines constitutes interstate commerce. The uncontradicted facts in this proceeding clearly establish that the Appellant's insurance business in South Carolina constitutes interstate commerce and that all of Appellant's activities are in furtherance of and incidental to its insurance business. It has also been established that the South Carolina "premium tax" statutes violate the commerce clause of the Constitution in that they illegally and unjustly discriminate against interstate commerce of Appellant and in favor of local commerce of South Carolina domestic insurance companies. The McCarran-Ferguson Act has not and cannot validate this unconstitutional state legislation. Not only has the legislature not reënacted these statutes, but, even if reënacted, the statutes would still be unconstitutional, because the McCarran-Ferguson Act was not intended to permit such regulation and taxation of interstate commerce, nor could that Act have constitutionally done so, even if Congress had evidenced such an intention.

The State of South Carolina has as such little real interest in the ultimate outcome of this case. Its revenue

system would not be interfered with if the statutes in question are held to be unconstitutional, since South Carolina could merely join the two-thirds of the states which tax foreign insurance companies on a non-discriminatory basis. The real beneficiaries of the discrimination are the owners of the domestic companies.

We, therefore, submit that the judgment of the Supreme Court of South Carolina should be reversed and that the prayer of the Appellant's Petition for Injunction and Equitable Relief should be granted.

Respectfully submitted,

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APPENDIX.

Sections 7948, 7949 of the Code of Laws of South Carolina, 1942, Volume 4, Chapter 157, Article 1. (pp. 594-596)

SECTION 7948. *Semi-annual license fees to be paid-returns of premiums collected.* In addition to the annual license fees now provided by law, the commissioner shall require each foreign life insurance company of any class licensed by him not incorporated under the laws of the State of South Carolina, except fraternal benefit orders operating under the grand lodge system, to pay as an additional and graded license fee an amount equal to two per centum on the total premiums, i. e., total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this State during the time the company has done business in this State since making last such return. Such returns shall be made under oath by an executive officer of the company: PROVIDED, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the reserve on all policies issued in South Carolina is invested in any or all of the following securities or property, to-wit: notes or bonds of the State of South Carolina or of counties or municipalities of the State or of sub-divisions thereof; or first mortgage bonds of real estate in this State; or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State; or average daily balance on deposits in banks of this State maintained continuously for six months next preceding date of such return; or any property situate within the State and returned for taxes therein, at the value at which it is returned, then, and in that case, the addi-

tional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said reserves, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said reserve, the additional license fee shall be one and one-fourth per centum, and if the entire reserve be so invested, under like conditions, the additional license fee on said premium receipts shall be one per cent. In addition to the annual license fee now provided by law, the insurance commissioner shall require each foreign fire insurance company, each foreign accident and health, each foreign casualty or surety company, and all other companies of any class licensed by him not incorporated under the laws of the State of South Carolina not hereinbefore specifically mentioned to pay as an additional and graded license fee an amount equal to two per cent. on the total premiums, i. e., total income or total receipts from the State, less return premiums for cancellation on risks in this State during the time the company has done business in this State since last such return. Such returns shall be made under oath by an executive officer of the company: PROVIDED, that if the executive officer of the company shall file with the insurance commissioner a sworn statement showing that at least one-fourth of the premium receipts on all risks in South Carolina is invested in the securities named in this section, then, and in that case, the additional license fee on premiums collected during the time such investments have been actually made and sustained shall be one and three-fourths per centum; under like conditions, if said investments be one-half of said premium receipts, the additional license fee shall be one and one-half per centum; under like conditions, if the investments shall be three-fourths of said premium receipts, the additional license fee shall be one and one-fourth per centum; if the entire premium receipts be so invested, under like conditions, the

additional license fee on said premium receipts shall be one per cent.: PROVIDED, FURTHER, that one-half of the said additional license fee collected under the terms of this section is allotted to the several counties, respectively, in proportion to said premiums collected in said counties, and the same is hereby appropriated to ordinary county purposes, and no additional license fee or county tax shall be levied on such companies. At the close of the semi-annual period, or as soon thereafter as possible, the insurance commissioner shall furnish the state treasurer a statement showing the amount of said premiums collected by each company in each of the several counties of the State, and the amount of additional license fees collected thereon; and the state treasurer, upon a warrant from the comptroller general, shall pay into the county treasurer of each county one-half of the additional license fee collected as aforesaid on the said premiums collected by each insurance company in that county: PROVIDED, that nothing in this article or any other article shall be construed as preventing any municipality from levying and collecting license fees or taxes in accordance with its ordinances. The return of said premium collections shall be made within thirty days after the 30th day of June and the 31st day of December of each year, and if the returns are not so made, the insurance commissioner may suspend the license of the company until such returns are made. The attorney general shall bring suit in the name of the State to collect any unpaid portion of license fees provided herein.

SECTION 7949. *Additional annual license fee.*—The Insurance Commissioner of South Carolina is hereby directed to require all insurance companies doing business in this State, including all domestic companies and all other companies of any class licensed by such insurance commissioner and not incorporated under the laws of South Carolina to pay, in addition to the annual license fee, now provided by law, a graduated license fee in an amount equal to one (1%) per cent of the total premiums collected in the State,

less return premiums for cancellation on risks: PROVIDED, that the terms hereof shall not apply to domestic insurance companies; and PROVIDED, FURTHER, that mutual fire insurance companies of other States, admitted to do business in this State, employing no agents, writing no business except on the property of its members, and doing business without profit shall pay annually on or before the first day of March, in addition to all other license fees which they are now required by law to pay, a graduated annual license fee in an amount equal to one (1%) per centum of the premiums and premium deposits and assessments collected by them in the State during the year ending on the thirty-first day of December next preceding, after deducting from such premiums and premium deposits and assessments the so-called dividends or unused or unabsorbed portion of the premiums and premium deposits and assessments applied or credited in part payment of such premiums or premium deposits and assessments or returned to policyholders in cash or otherwise during the year for which the said tax is computed.

The one (1%) per cent fee as provided for in the preceding paragraph shall be paid into the state treasury for state purposes, and the insurance commissioner of South Carolina is hereby required to collect said fee as other fees are collected and pay over to the state treasurer.

This section shall not be construed to in any way affect or reduce the annual license fees provided to be paid under existing laws, but it is intended to provide for the payment of an additional fee and the proceeds to be derived from the collection thereof shall be used for state purposes.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MOTION TO DISMISS OR AFFIRM

JOHN M. DANIEL,
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INDEX

Subject Index

	Page
Motion to dismiss or affirm	1
Brief in support of motion to dismiss or affirm	3

Table of Cases Cited

Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148	6
Continental Insurance Co. v. *Tennessee*, 311 U. S. 5	5
General American Tank Co. v. *Day*, 270 U. S. 367	4
International Shoe Co. v. *Washington*, No. 108, October Term, 1945 (decided December 3, 1945)	6
Interstate Bus Corp. v. *Blodget*, 276 U. S. 245	4
Lincoln National Ins. Co. v. *Read*, 89 L. Ed. 1250	4, 5
Prudential Insurance Co. v. *Benjamin*, 35 S. E. (2d) 586	1, 4
Southern Pacific v. *Arizona*, 89 L. Ed. 1469	6
Standard Dredging v. *Murphy*, 319 U. S. 306	6
United States v. *Southeastern Underwriters*, 322 U. S. 534	3, 4, 5, 6, 7

Statutes Cited

Code of South Carolina, 1942:	
Section 7948	3, 4, 6
Section 7949	3, 4, 6
Constitution of the United States:	
Aricle I, Section 8, Clause 3	3, 4
14th Amendment	4
Public Law No. 15, 79th Congress, Chapter 20, 1st Session, 59 Stat. 33, 15 U. S. C. A. 1011-1015	2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Appellant,

vs.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA,

Appellee

MOTION TO DISMISS OR AFFIRM

Pursuant to the provisions of Rule 7 and of Rule 12 of the Supreme Court of the United States, L. George Benjamin, as Insurance Commissioner of the State of South Carolina, the Appellee moves the Court to dismiss this appeal or in the alternative to affirm the judgment of the South Carolina Supreme Court (*Prudential* v. *D. D. Murphy, Insurance Commission*, — S. C. —, 35 S. E. (2d) 586) upon the ground that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument because:

I

The Appellant has failed to show that the tax laws of South Carolina unfairly discriminate against foreign insurance companies:

II

The South Carolina premium tax levied under Sections 7948-7949 of the Code of 1942 is levied against an intrastate activity of the Appellant:

III

Even if the South Carolina premium tax discriminates against foreign insurance companies it does not contravene the "due process" or "equal protection" clause of the Fourteenth Amendment to the Federal Constitution:

IV

Any burden imposed on interstate commerce by Sections 7948-7949 of the Code of 1942 is authorized by the Congress (Public Law 15, 79th Congress, Chapter 20, 1st Session, 59 Stat. 33, 15 U. S. C. A. 1011-1015):

V

Public Law 15, 79th Congress, Chapter 20, 1st Session 59 Stat. 33, 15 U. S. C. A. 1011-1015 authorizing and approving the questioned South Carolina Statutes is a proper exercise of Congressional power under Art. 1, Sect. 8, Clause 3 of the Constitution of the United States.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 707

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Appellant,

vs.

L. GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA,

Appellee

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

Statement

After paying the South Carolina premium tax (Code 1942, Sect. 7948, 7949) for many years (the statutes were enacted in 1909 and in 1931) without protest the Prudential Insurance Company brought this action in the South Carolina Supreme Court to enjoin its collection upon the theory that the holding of the United States Supreme Court that the business of insurance was commerce within the meaning of Art. 1 Section 8 Clause 3 of the Federal Constitution in *U. S. v. Southeastern Underwriters*, 322 U. S. 533 invalidated all State regulation and taxation of foreign insurance companies.

The South Carolina Supreme Court held (1) that the Company had failed to show that the tax laws of the state were discriminatory against foreign insurance companies; (2) that any question of the tax burdening interstate commerce is answered by the McCarran-Ferguson Act which Congress was authorized to enact under Art. 1, Sec. 8, Clause 3 of the Constitution and (3) that States may discriminate against foreign corporations without violating the Fourteenth Amendment citing *Lincoln National Ins. Co.* v. *Read*, 89 L. ed. 1250, 1252.

Prudential v. *Murphy*, — S. C. —, 35 S. E. (2d) 586.

I

The Prudential has failed to show that the tax laws of South Carolina do in fact discriminate against it.

Prudential v. *Murphy*, — S. C. —, 35 S. E. (2d) 586, 588.
Interstate Bus Corporation v. *Blodgett*, 276 U. S. 245.
General American Tank Co. v. *Day*, 270 U. S. 367.

II

The business of many corporations includes both interstate and intrastate activity. Such corporations are subject to regulation and taxation both by Federal and State Governments.

U. S. v. *Southeastern Underwriters*, 322 U. S. 534, 548, 562.

III

Since Sections 7948-7949 of the South Carolina Code place a tax on a purely intrastate activity—the premiums collected on South Carolina business—they do not burden interstate commerce.

"We may grant that a contract of insurance, considered as a thing apart from negotiation and execution does not itself constitute interstate commerce."

United States v. *Southeastern Underwriters*, 322 U. S. 534, 546-7.

If the South Carolina tax is considered as levied on the right to do business in the State measured by a percentage of annual premiums on South Carolina business it is a tax on intrastate activity.

Continental Insurance Co. vs. *Tennessee*, 311 U. S. 5.

IV

Even if the South Carolina taxes are more onerous on a foreign corporation than on a domestic company, there is no contravention of the Fourteenth Amendment.

Lincoln National v. *Read*, — U. S. —; 89 L. Ed. 1250, 1252; 65 S. Ct., 120.

V

Congress has declared that the continued regulation and taxation by the several states of the business of insurance is in the public interest, that silence by the Congress should not be construed as a barrier to State taxation, that the business of insurance is subject to the "laws of the several states which relate to the regulation or taxation of such business" and that no Act of Congress should be construed to invalidate, supersede or impair any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless the Act of Congress specifically relates to the business of insurance.

McCarran-Ferguson Act of Mar. 9, 1945, c. 20 Sect. 1, 59 Stat. 33, 15 U. S. C. A., 1011-1015.

Therefore if the South Carolina premium tax statutes (Code 1942, 7948-7949), are burdens on interstate commerce, Congress has authorized them.

VI

Congress may authorize a State to regulate interstate commerce or to impose burdens upon it.

International Shoe Co. v. *Washington* No. 108, 1945 Term decided 3 Dec. 1945, p. 4.
Southern Pacific v. *Arizona*, —— U. S. ——, 89 L. ed. 1469, 1474.
Standard Dredging v. *Murphy*, 319 U. S. 306, 308.
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148, 155 n.

Conclusion

The contention by the Prudential that the decision in *United States* v. *Southeastern Underwriters*, 322 U. S. 534 destroys the power of the State to regulate and tax any activity of a foreign insurance company and specifically invalidates the South Carolina premium tax is based upon a misconception of the scope in that case.

In the Southeastern case the Court was considering the sufficiency of an indictment under the Sherman Act charging two hundred private fire insurance companies and their rating bureau with restraining interstate commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire insurance in six Southeastern States. Admittedly the indictment charged conduct outlawed by the Sherman Act (322 U. S. 536) if it was applicable to the business of fire insurance.

The Court while recognizing that much insurance activity including the Policy Contract was not interstate commerce (322 U. S., 546-7) held that the restraints charged in the

indictment were effected through interstate activity and therefore the defendants were subject to the terms of the Sherman Act.

The Court emphasized the fact that this holding did not mean that State regulatory and tax laws were invalid (322 U. S. 534-5, 546-548). The Court was concerned solely with whether certain phases of insurance activity subjected companies to Federal anti-trust regulation. The holding that these activities did does not mean that South Carolina's premium tax on foreign insurance companies is a violation of Art. 1, Sect. 8, Clause 3 of the Federal Constitution.

It is submitted that all of the questions in the case at bar are settled in accord with the opinion below by *U. S.* v. *Southeastern Underwriters*, 322 U. S. 535, *Lincoln National* v. *Read*, —— U. S. ——, 89 L. ed. 1250 and by the McCarran-Ferguson Act, 59 Stat. 33, 15 U. S. C. A. 1011-1015.

Respectfully submitted,

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BRIEF FOR APPELLEE

Supreme Court of the United States

No. 707

October Term, 1945

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, APPELLANT,

versus

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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INDEX

PAGE

Statement 1

Summary of Argument 2

Argument:

I. The tax levied by South Carolina on the premiums collected on South Carolina business by the Prudential does not regulate interstate commerce 3

II. The South Carolina premium tax does not discriminate against interstate commerce 7

III. The decision in United States v. Southeastern Underwriters, 322 U. S. 533, does not invalidate the South Carolina tax 11

IV. The right of the State to regulate and tax the business of insurance is protected by the McCarran-Ferguson Act 14

Conclusion 18

Appendices:

A. Sec. 7773, S. C. Code of 1942 20

B. McCarran-Ferguson Act 20

C. Report No. 143, Feb. 13, 1945 of House Committee on the Judiciary 22

TABLE OF AUTHORITIES CITED

PAGE

CONSTITUTION AND STATUTES

Constitution of the United States:
- Art. I, Section 8, Clause 3 ..... 1, 8, 11
- Fourteenth Amendment 1, 16

Federal Statutes:
- Clayton Act, 38 Stat. 730 ..... 7, 15
- Federal Trade Commission Act, 52 Stat. 111 ..... 7, 15
- McCarran-Ferguson Act, 59 Stat. 34, (Public Law No. 15, 79th Congress, 15 U. S. C. 1011-1015) 14-17, 20-22
- Robinson-Patman Anti-Discrimination Act, 49 Stat. 1526 ..... 7, 15
- Sherman Act, 26 Stat. 209 ..... 7, 15

South Carolina Statutes:
- Code of 1942, Sec. 7773 ..... 4, 20
- Code of 1942, Secs. 7948-49 ..... 1, 4, 10

Report of House Committee on the Judiciary, No. 143, Feb. 13, 1945 ..... 16, 22-25

CASES

Aetna Life Ins. Co. v. Dunkin, 266 U. S., 389, 69 L. Ed., 342 4

Allgeyer v. Louisiana, 165 U. S., 578, 41 L. Ed., 832 16

Atlantic Refining Co. v. Virginia, 302 U. S., 22, 82 L. Ed., 24 9

Best & Co. v. Maxwell, 311 U. S., 454, 85 L. Ed., 275 8

Bethlehem Motors Corp. v. Flynt, 256 U. S., 421, 65 L. Ed., 1029 8

Cantey v. Phila. Life Ins. Co., 166 S. C., 181, 164 S. E., 609 4

Cloverleaf Butter Co. v. Patterson, 315 U. S., 148, 86 L. Ed., 754 ..... 1, 18

Connecticut Gen'l. Ins. Co. v. Johnson, 303 U. S., 77, 82 L. Ed., 673 16

Cooley v. Port Wardens, 12 How., 299, 13 L. Ed., 996 14

Crutcher v. Kentucky, 141 U. S., 47, 35 L. Ed., 649 8

TABLE OF AUTHORITIES CITED—Continued

	PAGE
Fisher's Blend Station v. Tax Commission, 297 U. S., 650, 80 L. Ed., 956	8
Gregg Dyeing Co. v. Query, 286 U. S., 472, 76 L. Ed., 1232	8
Hale v. Bimco Trading Co., 306 U. S., 375, 83 L. Ed., 771	8
Hartford Fire Ins. Co. v. Wilson, 187 U. S., 467, 47 L. Ed., 261	3
Hooper v. California, 155 U. S., 648, 39 L. Ed., 297	13
Insurance Tax Cases, In re, 160 Kan., 300, 161 P. (2d), 726	1
International Shoe Co. v. Shartel, 279 U. S., 429, 73 L. Ed., 781	6
International Shoe Co. v. Washington, 90 L. Ed., 109	6, 18
Lincoln Natl. Ins Co. v. Read, 89 L. Ed., 1250	1, 6, 9
McGoldrick v. Berwind-White Coal Min. Co., 309 U. S., 33, 84 L. Ed., 565	6
Mutual Life Ins. Co. v. Hill, 193 U. S., 551, 48 L. Ed., 788	3
N. L. R. B. v. Fainblatt, 306 U. S., 601, 83 L. Ed., 1014	7
N. L. R. B. v. Jones & L. Steel Corp., 301 U. S., 1, 81 L. Ed., 893	7
New York Life Ins. Co. v. Dodge, 246 U. S., 357, 62 L. Ed., 772	4
New York v. Roberts, 171 U. S., 658, 43 L. Ed., 323	8
Owen v. Bankers Life Ins. Co., 84 S. C., 253, 66 S. E., 290	4
Paul v. Virginia, 8 Wall., 168, 19 L. Ed., 357	3, 13
Pink v. A. A. A. Hwy. Express, 314 U. S., 201, 86 L. Ed., 152	3
Polish Natl. Alliance v. N. L. R. B., 322 U. S., 643, 88 L. Ed., 1509	5, 13, 17
Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S., 90, 82 L. Ed., 68	8
Railway Express Co. v. Virginia, 282 U. S., 440, 75 L. Ed., 450	9
Robbins v. The Taxing District, 120 U. S., 489, 30 L. Ed., 694	8

TABLE OF AUTHORITIES CITED—Continued

	PAGE
Scott v. Donald, 165 U. S., 58, 41 L. Ed., 632	8
Southern Pacific v. Arizona, 89 L. Ed., 1469	14, 18
Sprout v. South Bend, 277 U. S., 163, 72 L. Ed., 833	8
State v. Prudential Ins. Co. (Ind.), 64 N. E. (2d), 150.	1
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S., 346, 67 L. Ed., 297	16
Supreme Lodge, K. of P. v. Meyer, 198 U. S., 508, 49 L. Ed., 1146	4
United States v. Southeastern Underwriters, 322 U. S., 533, 88 L. Ed., 1440	1, 2, 5, 6, 10, 11-13, 17
Welton v. Missouri, 91 U. S., 275, 23 L. Ed., 347	8
Western Live Stock v. Bureau of Revenue, 303 U. S., 250, 82 L. Ed., 823	6
Wickard v. Filburn, 317 U. S., 111, 87 L. Ed., 122	7

BRIEF FOR APPELLEE

Supreme Court of the United States

No. 707

October Term, 1945

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation, APPELLANT,

versus

L. GEORGE BENJAMIN, as Insurance Commissioner of the State of South Carolina

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

STATEMENT

The Prudential Insurance Company sued in the South Carolina Supreme Court to enjoin the collection of the premium license tax levied against foreign insurance companies by Section 7948-7949 of the South Carolina Code of 1942 upon the allegation that this tax contravened the Commerce Clause of the Constitution.[1]

That Court denied relief, 35 S. E. (2d) 586.[2] Upon appeal to this Court a motion to dismiss was filed and probable jurisdiction was noted on January 28, 1946 (R. 47).

[1] The position that the statute violated the Fourteenth Amendment has been abandoned. (R. 9, 27, 40-43). *Lincoln National Insurance Co. v. Read*, 89 L. ed. 1250.

[2] Decisions of other Courts on similar state laws since *U. S. v. Southeastern*, 322 U. S. 533, are in accord with the South Carolina decision. *In re: Insurance Tax Cases*, 160 Kan. 300, 161 P. (2d) 726; *State v. Prudential Ins. Co.* (Ind.), 64 N. E. (2d) 150.

SUMMARY OF ARGUMENT

South Carolina's tax is levied on foreign corporations for the privilege of doing business within the state. It is measured by a percentage of the premiums collected in the state from South Carolina residents paid on policy contracts made therein and governed by its laws.

Since the state may prohibit a foreign corporation from doing intrastate business within the state, it may impose conditions. The payment of this tax is an appropriate condition.

The state statute does not discriminate against interstate commerce merely because it classifies **foreign** insurance companies for the tax and exempts **domestic** companies. That classification is appropriate because of the benefits received by the State from the domestic corporations. In any event it is one which the State may make without contravening the Commerce Clause or the Fourteenth Amendment.

An examination of the decision in *U. S. v. Southeastern Underwriters*, 322 U. S. 533, shows that it is confined to the holding that Congress intended the insurance business to be subject to the Sherman Act and that since much of this business was conducted in interstate commerce it was appropriate for Congress to legislate with reference thereto. The decision does not withdraw from South Carolina the power to lay its premium tax.

Any question as to the intent or effect of the *Southeastern* decision is settled by the McCarran-Ferguson Act in favor of the continued state taxation and regulation of those features of insurance activities heretofore regulated and taxed.

ARGUMENT

I.

THE TAX LEVIED BY SOUTH CAROLINA ON THE PREMIUMS COLLECTED ON SOUTH CAROLINA BUSINESS BY THE PRUDENTIAL DOES NOT REGULATE INTERSTATE COMMERCE.

(Assignments of Error 2, 3, 8 and 10.)

The Prudential has twenty-one agents engaged in selling insurance contracts in the State of South Carolina. These agents operate out of four district offices located in the state. Applications for insurance are solicited in South Carolina from South Carolina residents by these agents. If the agent is successful in obtaining an application, medical examinations and investigations of prospective risks are made in the state by local physicians and local investigators employed by the Prudential. (R. 3, 5.)

These applications with the supporting papers are forwarded by one of the district offices from South Carolina to Prudential's Home Office in New Jersey. If the application is approved the insurance contract is prepared and signed by the appropriate officers. It is then forwarded to one of the South Carolina district offices and delivered by an agent of the Prudential in South Carolina to the South Carolina applicant in exchange for the initial premium. (R. 3.)

The contract between the Prudential and the applicant becomes effective with the delivery of this policy in South Carolina. *Paul v. Virginia*, 8 Wall. 168, 183; *Hartford Fire Ins. Co. v. Wilson*, 187 U. S. 467.

These insurance contracts are South Carolina contracts subject to the laws of that State. *Pink v. A. A. A. Hwy. Express*, 314 U. S. 201; *Mutual Life Ins. Co. v. Hill*, 193 U. S.

551; *New York Life Ins. Co. v. Dodge*, 246 U. S., 357; *Supreme Lodge, K. of P., v. Meyer*, 198 U. S. 508; *Aetna Life Ins. Co. v. Dunkin*, 266 U. S. 389; *Owens v. Bankers Life Ins. Co.* 84 S. C. 253, 66 S. E. 290; *Cantey v. Phila. Life Ins. Co.*, 166 S. C. 181, 164 S. E. 609.

Not only is this established by the decisions of this Court and the Courts of South Carolina but it is also the statute law of South Carolina. *Code of 1942*, § 7773. (Appellee's Brief, App. A.) The Prudential Insurance Company by doing business in South Carolina has consented to this statute and does not question its validity here.

The South Carolina premium tax statutes (Appellant's Brief, App. 61-64) levy a tax on foreign insurance companies doing business in the state for the privilege of doing that business measured by a graded license fee in an amount equal to three per centum "on the total premiums, *i. e.*, total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums of such company as collected from citizens of or residents of this state during the time the company has done business in this State since making last such return". *Code of 1942, Sections 7948-49.*

In practice, premiums on South Carolina policies are paid by the South Carolina resident to one of the district offices in the state on premium notices mailed to the policyholder by one of these district offices. On receipt of payment the district office issues the appropriate premium receipt. (Appellant's Brief, 18.)

If the tax event be considered as the consummation of the policy contract between the Prudential and the South Carolina resident, the facts as alleged show that this event occurs in South Carolina and that the contract is controlled by South Carolina law. If the tax event is considered as the

payment of the periodic premium on this South Carolina contract, this payment is an event which occurs within the state. If the tax event be considered the granting of Prudential's request to do intrastate business in South Carolina and the annual renewal of that grant, it occurred in South Carolina.

That the policy contract is prepared in New Jersey, receives the signature of the Prudential officers there, is sent through the mails to the company's agent in South Carolina, and that the premium monies after receipt at the Prudential district offices in South Carolina are forwarded to the home office in New Jersey, are matters immaterial to the issues. The activity which measures the South Carolina tax is an aggregate of a number of local transactions. From *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 649:

> "Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business **is in effect merely a congeries of contracts,** the States may, **for taxing** and divers other purposes, **regulate the making of such contracts** and the insurance business **free from the limitations imposed upon state action by the Commerce Clause.**" (Emphasis supplied.)

The decision in *United States v. Southeastern Underwriters Assoc.*, 322 U. S. 533, 546-7, is not to the contrary:

> "We may grant that a contract of insurance, considered as a thing apart from negotiations and execution, does not itself constitute interstate commerce."

In so far as its underwriting business is concerned, the Prudential Insurance Company is engaged in the intrastate activity of making policy contracts and collecting premiums on these policies in many of the states of the Union. It is true that money, documents and correspondence in considerable quantity pass between its home office and its

agents in the various states. It is also true that a company of the vast resources of the Prudential cannot invest its funds without those investments having an effect on interstate commerce. Nevertheless the company's primary business is that of writing policies insuring the lives of individuals. The making of these policy contracts and the collection of premiums on them are local matters transacted within the confines of a single state. That the company makes a large number of these contracts and has an immense premium income does not alter this fact.

Since the Prudential may not do an intrastate business in South Carolina without the permission of the State, South Carolina may impose on it for the privilege of doing business a privilege tax more onerous that it imposes on domestic corporations. *Lincoln National Ins. Co. v. Real*, 89 L. Ed. 1250. The fact that the Prudential is engaged in interstate activities does not alter South Carolina's right to impose this tax for the privilege of doing intrastate business. *International Shoe Co. v. Shartel*, 279 U. S. 429, 433; *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 258.

The *Southeastern* decision recognizes this principle:

> "It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities, which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the state." (322 U. S. 548.)

The Commerce Clause itself does not limit South Carolina's right to tax this intrastate activity. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33. It is

true that if Congress has enacted laws which regulate intrastate affairs because of their effect on interstate commerce (*Wickard v. Filburn*, 317 U. S. 111; *N. L. R. B. v. Jones & L. Steel Corp.*, 301 U. S. 1; *N. L. R. B. v. Fainblatt*, 306 U. S. 601) the state law is superseded to the extent of actual conflict. An examination of the Acts of Congress shows that, with the exception of the McCarran-Ferguson Act, there is no statute dealing with the regulation of insurance companies as such. Congress has elected to regulate labor relations of all businesses where these relations affect interstate commerce, and were we discussing a South Carolina labor statute it would be necessary for the Court to decide whether that statute was in conflict with the National Labor Relations Act or the Fair Labor Standards Act. It is also true that, but for the McCarran-Ferguson Act, there might be a conflict between some state statute and the federal laws relating to trusts, monopolies and unfair trade practices (The Sherman Act, 26 Stat. 209; The Clayton Act, 38 Stat. 730; The Robinson-Patman Anti-discrimination Act, 49 Stat. 1526; Federal Trade Commission Act, 52 Stat. 111). Since none of this Congressional legislation is in conflict with the South Carolina premium tax statutes, it has no relevancy here.

II.

THE SOUTH CAROLINA PREMIUM TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

(Assignments of Error 1, 3, 8, 9 and 10.)

The burden of the Prudential's argument is that the foreign insurance corporation must pay three per cent of its premium income on South Carolina business to the State while the domestic insurance companies do not pay this tax

or bear any equivalent burden (R. 6). It claims that this classification discriminates against interstate commerce.

South Carolina classifies for taxation the **foreign** insurance company and exempts from this tax the **domestic** insurance company. It does not classify for taxation **interstate** commerce and exempt **intrastate** commerce. (Cf. *New York v. Roberts*, 171 U. S. 658; *Bethlehem Motors Corp v. Flynt*, 256 U. S. 421.)

Many of the domestic insurance companies do business outside of South Carolina (R. 10). Assuming that these South Carolina companies which operate in other states do their business along the lines of the Prudential (R. 3, 5) and assuming that this business is interstate commerce, then these domestic companies would be required to pay the South Carolina premium tax if the Prudential's contention that it is a tax on interstate commerce is sound. Such is not its purpose or effect. The domestic company is exempt be-

The cases cited by appellant (Brief 24-27) are readily distinguished from the facts here. Those cases seem to fall into these classes: (1) Statutes which prohibit the entry of goods into a state, except under onerous conditions: *Welton v. Missouri*, 91 U. S. 275, where the license tax was upon persons who sold within the state goods not manufactured or produced therein; *Hale v. Bimco Trading Co.*, 306 U. S. 375, where the statute imposed a 15c per cwt. inspection fee upon foreign cement and no fee upon cement produced in the state; *Scott v. Donald*, 165 U. S. 58, where the statute prohibited the importing of liquor except by the State Dispensary Commission; (2) Statutes laying a direct burden upon the channels of interstate commerce: *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, where the statute laid an occupation tax upon the business of loading and unloading vessels engaged in interstate commerce; *Sprout v. South Bend*, 277 U. S. 163, where a city ordinance imposed a license tax upon busses engaged in interstate operations; *Crutcher v. Kentucky*, 141 U. S. 47, where the statute required the licensing of agents of express companies engaged in interstate commerce; (3) The "drummer" cases: *Robbins v. The Taxing District*, 120 U. S. 489, *Best & Co. v. Maxwell*, 311 U. S. 454, where the statute imposed a fixed sum license tax upon the business of displaying goods by sample within the state for direct shipment to customers in interstate commerce; and (4) Statutes which tax gross revenues derived from interstate commerce: *Fisher's Blend Station v. Tax Commission*, 297 U. S. 650.

In state statutes stricken down as discriminatory there must be a discrimination against interstate commerce itself; it must accomplish a substantial distinction and a real injury. *Gregg Dyeing Co. v. Query*, 286 U. S. 472. The South Carolina premium tax does not come within the reasoning of the above decisions.

cause it has a South Carolina charter, not because it operates in intrastate commerce.

Were the Prudential to surrender its New Jersey charter and incorporate under the laws of South Carolina but otherwise operate its business as outlined in its petition, it would be exempt from this premium tax because it would be a **domestic** corporation. If, on the other hand, it retained its New Jersey charter but moved its principal office to South Carolina, discontinued its sale of policies and collection of premiums in all other states and confined its investments to South Carolina, it would still be liable for this tax for it would still be a **foreign** corporation.

The tax, therefore, can only be construed as a tax on foreign corporations for the privilege of doing an intrastate business in South Carolina. The State has the power to levy this tax, even though domestic insurance companies are exempt. *Lincoln National Ins. Co. v. Read*, 89 L. Ed. 1250, 1252. This Court has held that even though a corporation is legally in a state for the doing of interstate business, the State can, because it is **a foreign corporation,** require it to obtain the consent of the State and pay a fee for the doing therein of intrastate business. *Railway Express Co. v. Virginia*, 282 U. S. 440; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22.

The State Supreme Court held that the Prudential had failed to show that the classification made by the State of foreign insurance companies as covered and domestic insurance companies as exempt actually discriminated against the foreign insurance company, because the comparisons of the petition failed to take into consideration property taxes paid by the resident companies. (R. 22, 10.)

The return does not admit discrimination but points out the economic advantage to South Carolina of the investments of reserves by the domestic companies in South

Carolina industry and securities. The Prudential drains off many hundreds of thousands of dollars from the state for investment elsewhere. (R. 14, 15.) Cf. Appellant's Brief, 21.

An examination of Section 7948 shows the importance which South Carolina attaches to this investment of insurance reserves in South Carolina securities and industries. If the Prudential were to invest the reserves on South Carolina business in South Carolina, it would obtain a reduction of one-third of this premium tax. In reaching a conclusion as to whether there is an actual discrimination against the foreign corporation it is appropriate for this Court to consider not only the property taxes paid by the domestic companies, but also the economic advantages in having those companies invest their reserves in the State and subject to the supervision of the State.

For thirty-five years the Prudential Insurance Company has paid this license tax to South Carolina without protest. (R. 5, 8.) Its own petition characterizes this tax as "lawfully assessed" prior to 1945. (R. 8.) There has been no change in this South Carolina statute in recent years. Pertinent here are the remarks of the Court in the *Southeastern case* (322 U. S. 549):

> "And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the state regulatory and tax laws should be declared valid."

The prosperity of the Prudential, the growth of its business within and without South Carolina (R. 3-5) over a long period of time, is proof that this statute and similar legislation in other states has imposed no undue burden upon the appellant. The argument that some states have

modified their insurance regulatory and tax structures since the decision of *United States v. Southeastern, supra,* has no relevancy. (Appellant's Brief 57.) We are concerned solely with the question of whether the South Carolina premium tax contravenes the Commerce Clause.

III.

THE DECISION IN UNITED STATES V. SOUTHEASTERN UNDERWRITERS, 322 U. S. 533, DOES NOT INVALIDATE THE SOUTH CAROLINA PREMIUM TAX.

(Assignment of Error 1.)

Since the Prudential after paying the South Carolina premium tax for thirty-five years without protest justifies its challenge of that statute upon the ground that the *Southeastern* decision invalidates state legislation of this type, its holding should be examined.

The Southeastern Underwriters Association and 200 member stock fire insurance companies were charged with violating the Sherman Act by conspiring to restrain interstate commerce in maintaining noncompetitive premium rates in six states and by monopolizing trade in fire insurance in and among the same states. The District Court sustained a demurrer to the indictment.

The only two questions considered by this Court were: "(1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains and monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute 'Commerce among the several States' so as to make them subject to regulation by Congress under the Commerce Clause?" 322 U. S. 538.

The Court held: (1) that the word "commerce" in the Constitution included a business such as insurance, that much of the activity of insurance companies, including that alleged in the indictment, was conducted across state lines and therefore subject to regulation by Congress; (2) that the intent of the Sherman Act was to treat insurance as any other trade, and if, as charged, the defendants conspired to restrain and monopolize interstate commerce there was a violation of that statute.

The dissenting opinions agree that the insurance business is subject to Congressional power under the Commerce Clause but find that the Congress did not intend the Sherman Act to apply.

The opinion of the Court carefully points out that for seventy-five years it had held in actions questioning state legislation that the "Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies." 322 U. S. 533, 534.

The Court recognizes that the same legal formulæ devised to uphold state power may not be used to strike down Congressional power under the Commerce Clause.

It recognizes that the insurance contract itself is not interstate commerce but that certain aspects of the insurance business conducted across state lines do constitute interstate commerce. Many activities of a business may be intrastate and therefore subject to state control and taxation while other activities of the same business are interstate and subject to Federal regulation. In such a situation the practical test is whether the competing demands of state and nation may be met. In deciding whether they may the Court will in the absence of Federal regulation accept as persuasive the long period of state taxation and regulation. 322 U. S. 547-549.

While the holding of the Court is inconsistent with *dicta* in some of the cases (*Paul v. Virginia*, 8 Wall. 168, 183; *Hooper v. California*, 155 U. S. 648, 655), we do not understand it to overrule those decisions holding these state statutes valid. 322 U. S. 543. For example, we believe that the state statute in *Paul v. Virginia* would be sustained today.

The opinion concludes with an answer to the position that it invalidates state legislation:

> "The argument that the Sherman Act necessarily invalidates many state laws regulating insurance we regard as exaggerated. Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. *Cf. Parker v. Brown*, 317 U. S. 341, 350-352, 87 L. ed., 315, 325-327, 63 S. Ct., 307. No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices."

In stressing the effect on state laws relating to rates and boycotts the Court inferentially holds that other state legislation is unaffected. This is in accord with our position. Until Congress says that the premium tax on South Carolina business has such an effect on interstate commerce as to place it in conflict with a Federal statute, that tax is a lawful fee for the privilege of doing business within the state.

"Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation". *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, 649.[4]

[4] *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643, was under consideration by the Court at the same time as was the *Southeastern* case, 322 U. S. 538, 563, 580, 587, 653.

IV.

THE RIGHT OF THE STATE TO REGULATE AND TAX THE BUSINESS OF INSURANCE IS PROTECTED BY THE McCARRAN-FERGUSON ACT.

(Assignments of Error 4, 5, 6 and 7.)

By Public Law No. 15, 79th Congress, 15 U. S. C. 1011-1015, commonly known as the McCarran-Ferguson Act, (Appellee's Brief, App. B) Congress sought to put an end to the suggestion that the *Southeastern Underwriters* decision had destroyed the regulations and tax statutes of the various states relating to insurance. (Appellee's Brief, App. C.)

Since under our view the rights of the states to regulate and tax purely intrastate aspects of the insurance business is clear without Congressional action, it is unnecessary to define with particularity the several provisions of this Act. However, the point might be briefly made that even were this state taxation an encroachment upon the National Government's right to regulate interstate commerce, the passage of the McCarran-Ferguson Act saves it from invalidity.

In the line of cases which followed *Cooley v. Port Wardens*, 12 How. 299, a distinction has been made between those aspects of interstate commerce which require national uniformity of regulation and those local in nature which do not. *Southern Pacific v. Arizona*, 89 L. Ed. 1469, 1474. In the former field the failure of Congress to regulate has been held to constitute a presumption that Congress intended that there be no regulation by the states, while in the latter field the states were free to regulate until Congress had acted affirmatively. (Cf. Appellant's Brief 44.)

In the McCarran-Ferguson Act Congress has legislated in both of these fields. As to those aspects of the insurance business requiring uniform national regulation it has rebutted the presumption by saying that its silence is not to be construed as prohibiting state regulation. As to those aspects of the insurance business which comprise matters local in nature the Congress has given specific permission to the states to continue as heretofore in regulation and taxation.

The Sherman Act, the Clayton Act, the Federal Trade Commission Act and the Robinson-Patman Antidiscrimination Act are federal statutes pertaining to matters national in character heretofore regarded as requiring uniformity of application. As to them, Congress provided (with exception of those features of the Sherman Act dealing with boycott, coercion and intimidation) that they are not to apply to the insurance business until January 1, 1948, and then only to "the extent that such business is not regulated by State law"—thus saying that its failure to make the mentioned Acts apply to the insurance business at the present time is not to be construed as prohibiting state regulation in these fields.

As to those aspects of the insurance business which the states had previously been regulating and taxing as local matters, the Congress provided that they "shall be subject to the laws of the several states which relate to the regulation and taxation of such business." Continued state regulation is affirmatively provided. The extent of the state regulation intended by Congress is established by the Act and by its legislative history as the extent to which the states had regulated the local aspects of the insurance business under the law as it had been interpreted prior to the *Southeastern Underwriters* decision.

Senator McCarran, one of the sponsors of the Bill, made this clear when he stated in the Senate (Cong. Rec., Vol. 91, 1470):

> "It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case."

Similarly in the formal report of the House Committee on the Judiciary (House Report No. 143, February 13, 1945, Appellee's Brief, App. C.) this purpose is manifested:

> "Your Committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective states. * * *
>
> "The Committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several states may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several states, and thus enables insurance companies to comply with State laws. * * *
>
> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we **should provide for the continued regulation and taxation of insurance by States, subject,** always, however, **to the limitations set out in the controlling decisions** of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Conn. Genl. Ins. Co. v. Johnson* (303 U. S. 77), which hold, inter alia,

that a State does not have power to tax contracts of insurance or re-insurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." (Emphasis supplied.)

An examination of the *Allgeyer, Cotton Compress Co.* and *Johnson* cases will show that the decisions there protected individuals and corporations from state laws violating the provisions of the Fourteenth Amendment.

The extent of the State's power to regulate and tax prior to the *Southeastern Underwritgrs* decision is found in the *Polish National Alliance* case:

> "Such was the context in which this court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, **the states may, for taxing** and divers other purposes, **regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause.** (Emphasis supplied.)

And in *U. S. v. Southeastern Underwriters:*

> "For seventy-five years this Court has held, whenever the question has been presented, that **the Commerce Clause** of the Constitution **does not deprive the individual state of power to regulate and tax specific activities of foreign insurance companies** which sell policies within their territories." (Emphasis supplied.)

To our basic contention that the states have the right to regulate and tax intrastate aspects of the insurance business there is added the further position that the legislative body of the National Government has properly given its permission to the states to continue such regulation and taxation, even though the intrastate field in which the states

are operating might also lie within the legislative reach of Congress.

The grant of such permission by Congress has long been an acknowledged power of that body. "Congress has undoubted power to redefine the distribution of power over interstate commerce", and may "permit the states to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific v. State of Arizona*, 89 L. Ed., 1469, 1474. Cf. *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, and *International Shoe Co. v. Washington*, 90 L. Ed. 109.

CONCLUSION

For these reasons we submit that the judgment of the South Carolina Supreme Court should be affirmed or the appeal dismissed.

Respectfully submitted,

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APPENDIX

APPENDIX A.

§7773. **Condition precedent to doing business in this State.**—It shall be a further condition precedent to the right of any such corporation to do business in this State, that it shall be taken and deemed to be the fact irrebutable, and part and parcel of all contracts entered between such corporation and a citizen or corporation of this State, that the taking or receiving, from any citizen or corporation of this State, of any charge, fee, payment, toll, impost, premium or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding.

1942 S. C. Code, §7773.

APPENDIX B.

McCarran-Ferguson Act

Chapter 20—Public Law 15

(S. 340)

An Act to express the intent of the Congress with reference to the regulation of the business of insurance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until January 1, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Stand-

ards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Sec. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

Sec. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected.

Approved March 9, 1945.

15 U. S. C., Sections 1011-1015.

APPENDIX C.

House Committee on the Judiciary

House Report No. 143, February 13, 1945

The Committee on the Judiciary, to whom was referred the bill (S. 340) to express the intent of the Congress with reference to the regulation of the business of insurance, having considered the same, report favorably thereon with an amendment with the recommendation that the bill, as amended, do pass.

GENERAL STATEMENT

From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to Federal law.

On June 5, 1944, in the case of *U. S. v. Southeastern Underwriters Association et al.*, the Supreme Court decided

that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

The Attorney General, in several appearances before the Judiciary Committee, frankly stated that the Department of Justice had no opposition to an extension of time to the insurance industry in order to make necessary adjustments to this decision.

Inevitable uncertainties which followed the handing down of the decision in the *Southeastern Underwriters Association case*, with respect to the constitutionality of State laws, have raised questions in the minds of insurance executives, State insurance officials, and others as to the validity of State tax laws as well as State regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the *Southeastern Underwriters case*, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several States may know that the Congress desires to protect the continued regulation and taxation

of the business of insurance by the several States, and thus enables insurance companies to comply with State laws. What is more, the Congress proposes by this bill to secure adequate regulation and control of the insurance business.

Nothing in this bill is to be so construed as indicating it to be the intent or desire of Congress to require or encourage the several States to enact legislation that would make it compulsory for any insurance company to become a member of rating bureaus or charge uniform rates. It is the opinion of Congress that competitive rates on a sound financial basis are in the public interest.

It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346) and *Connecticut General Insurance Co. v. Johnson* (303 U. S. 77), which hold, *inter alia*, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

PURPOSE OF THE BILL

The purpose of the bill is two-fold: (1) to declare that the continued regulation and taxation by the several States

of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the States by suspending the application of the Sherman and Clayton Acts for approximately two sessions of the State legislatures, so that the States and the Congress may consider legislation during that period. It should be noted that this bill, by the moratorium proposed therein, does not repeal the Sherman and Clayton Acts, but opportunity will have been granted for the States to permit agreements and contracts by insurance companies which otherwise might be in violation of the Sherman and Clayton Acts. It should be noted further that no moratorium is granted from the Sherman Act relative to agreements or acts of boycott, coercion, or intimidation.

* * * * *

U. S. Code, Congressional Service, 1945, No. 2, pages 214-16.

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Supreme Court of the United States.

OCTOBER TERM, 1945.

No. 707.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Appellant,

vs.

GEORGE BENJAMIN, AS INSURANCE COMMISSIONNER OF THE STATE OF SOUTH CAROLINA,

Appellee.

BRIEF ON BEHALF OF THE STATES OF ALABAMA, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW YORK, OHIO, OKLAHOMA AND TEXAS, AS AMICI CURIAE.

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INDEX.

Question presented 1
Summary of argument 2
Argument 3
I. United States v. South-Eastern Underwriters Association does not invalidate South Carolina premium tax laws 3
II. The premium tax laws of South Carolina are on intrastate business and not a burden on interstate commerce 6
III. South Carolina premium tax laws are not in violation of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States 16
IV. The effect of McCarren-Ferguson Act 20
Conclusion 44

Authorities Cited.

Allgeyer v. Louisiana, 165 U. S., 579 24
California v. Thompson, 313 U. S., 109, 85 L. Ed., 734 14
Cheney Bros. Co. v. Massachusetts, 246 U. S., 147 9
Clark Distilling Co. v. Western Maryland R. Co., 242 U. S., 311 32
Cloverleaf Butter Co. v. Patterson, 315 U. S., 148 27
Conn. Gen. Life v. Johnson, 303 U. S., 77 7

Connecticut General Life Insurance Co. v. Johnson, 303 U. S., 77 25
Compania Tobaccos v. Collector, 275 U. S., 87, 98 7
Cooley v. Port Wardens, 53 U. S., 299 27
Duckworth v. Arkansas, 314 U. S., 390, 86 L. Ed., 294. 14
Engle v. O'Mally, 219 U. S., 128 8
Equitable Life v. Pa., 238 U. S., 143 7
Finch v. McKittrick, 305 U. S., 395 43
Ford Motor Co. v. Beauchamp, 308 U. S., 331 ..... 9, 19
General Trading Co. v. State Tax Commission, 322 U. S., 335, 88 L. Ed., 1309 14
German Alliance Insurance Co. v. Kansas, 233 U. S., 389 34
Illinois Natural Gas Co. v. Central Illinois Publ. Service Co., 314 U. S., 498, 86 L. Ed., 371 14
In Re Insurance Cases, 161 Pac., 726 26
Indiana v. Prudential Ins. Co., 64 N. E., 150 ..... 12, 26, 45
Kentucky Whip & Collar Co. v. Illinois C. R. Co., 299 U. S., 334 35
Lincoln Life v. Read, 325 U. S., 673, 65 S. Ct., 1250 ..... 7, 16
Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans, 221 U. S., 346 8
Metropolitan Life Ins. Co. v. New Orleans, 205 U. S., 395 8
McGoldrick v. Gulf Oil Corp., 309 U. S., 414 40
McGoldrick v. Berwind-White Coal Min. Co., 309 U. S., 33, 83 L. Ed., 585 ..... 14, 38, 40
Nelson v. Sears, Roebuck & Co., 312 U. S., 359 ..... 11, 18
Ozark Pipe Line v. Monier, 266 U. S., 555 41

Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S., 403 10
Parker v. Brown, 317 U. S., 341, 87 L. Ed., 315 14
Paul v. Virginia, 8 Wall., 168 ..... 3, 5
Polish National Alliance v. National Labor Relations Board, 322 U. S., 643 12
Safe Harbour Water Corp. v. Federal Power Commission, 124 F. (2d), 800 35
Southern Pac. Co. v. State of Arizona, 325 U. S., 761 13
South Carolina Highway Dept. v. Barnwell Bros., 303 U. S., 177, 82 L. Ed., 734 14
Southern Natural Gas Corp. v. Alabama, 301 U. S., 148 9
Southern Natural Gas Co. v. Alabama, 301 U. S., 148 19
Stone v. Interstate Natural Gas Co., 103 Fed. (2d), 544 19
State of Wisconsin v. J. C. Penny Co., 311 U. S., 435 18
St. Louis Compress Co. v. Ark., 260 U. S., 346 25
U. S. v. South-Eastern Underwriters Association, 322 U. S., 533 ..... 3, 5, 7, 8, 11, 26
Van Allen v. The Assessors, 70 U. S., 573 ..... 30, 39
Welton v. Missouri, 91 U. S., 275 42
West India Oil Co. v. Domenel, 311 U. S., 20 40
Wilkerson v. Rahrer, 140 U. S., 545 30
White & Prince v. Henniford, 305 U. S., 434 12
Whitfield v. Ohio, 297 U. S., 431 34

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 707.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Appellant,

vs.

GEORGE BENJAMIN, AS INSURANCE COMMISSIONER OF THE STATE OF SOUTH CAROLINA,

Appellee.

BRIEF ON BEHALF OF THE STATES OF ALABAMA, INDIANA, KANSAS, MASSACHUSETTS, MICHIGAN, NEBRASKA, NEW YORK, OHIO, OKLAHOMA AND TEXAS, AS AMICI CURIAE.

THE QUESTION PRESENTED.

The sole question presented is whether the statutes of South Carolina, which impose a tax on the gross premiums received in such state by a foreign insurance company, contravene the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

SUMMARY OF ARGUMENT.

I. The decision of this court in **United States v. South-Eastern Underwriters Association,** 322 U. S., 533, does not invalidate the South Carolina law in question or the laws of any state which exact from foreign insurance companies a tax on the premiums received by them from policies covering risks within such state.

II. The gross premium tax imposed upon foreign insurance companies by South Carolina and other states is for the privilege of entering such states and engaging in business therein, and is not levied on the interstate business of such companies and places no undue burden on interstate commerce.

III. The statutes in question, in that they impose a tax upon foreign insurance companies, without imposition of a like tax upon domestic insurance companies, are not in violation of the Fourteenth Amendment of the Constitution of the United States or the Commerce Clause of the Constitution of the United States.

(IV) By the enactment of the McCarran-Ferguson Act (Public Law 15, 79th Congress), the Congress of the United States clearly recognized the inherent power of the states to regulate and tax insurance companies and has openly approved all then existing state laws imposing taxes upon foreign insurance companies doing business within the several states.

ARGUMENT.

I.

THE DECISION OF THIS COURT IN UNITED STATES V. SOUTH-EASTERN UNDERWRITERS ASSOCIATION, 322 U. S., 533, DOES NOT INVALIDATE THE SOUTH CAROLINA LAW IN QUESTION OR THE LAWS OF ANY STATE WHICH EXACT FROM FOREIGN INSURANCE COMPANIES A TAX ON THE PREMIUMS RECEIVED BY THEM FROM POLICIES COVERING RISKS WITHIN SUCH STATE.

The appellant comes into this court challenging the right of the state of South Carolina to levy a tax on its total premium receipts in the state. With respect thereto, it is contended that, because of the decision in **United States v. South-Eastern Underwriters Association**, 322 U. S., 533, the appellant is engaged in interstate commerce and that **Paul v. Virginia**, 8 Wall., 168, in which it was held that the states have power to regulate or tax the business of insurance, was overruled by said decision.

An analysis of the court's opinion in **United States v. South-Eastern Underwriters Association, supra**, will disclose that said case in no way supports such contention. The issue presented therein raised but two questions which, as stated by Mr. Justice Black who delivered the majority opinion of the court, were (page 538):

> "(1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which ~~restrain~~ restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which

> stretch across state lines constitute 'commerce among the several states' so as to make them subject to regulation by Congress under the Commerce Clause?"

Therefore, since only the above questions were presented, the court's affirmative answer to each does not sustain appellant's position.

Pointing out the dire results which would follow if further restrictions were placed upon state power (which further restrictions appellant contends are now imposed upon the states), the court said (page 544):

> "• • • Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. • • •"

After stating that in order "to uphold insurance laws in other states, including tax laws, Paul v. Virginia's generalization and reasoning have been consistently adhered to," Mr. Justice Black made the following observation (page 545):

> "Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine congressional power under the Commerce Clause. • • •"

As a further indication of the court's attitude toward the exercise of state power, it is declared (page 547):

> "Another reason advanced to support the result of the cases which follow Paul v. Virginia has been that, if any aspects of the business of insurance be treated as interstate commerce, 'then all control over it is taken from the states and the legislative regulations which this court has heretofore sustained must be declared invalid.' Accepted without qualification, that broad statement is inconsistent with any decisions of this court. It is settled that, for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated. And the fact that particular phases of an interstate business or activity have long been regulated or taxed by states has been recognized as a strong reason why, in the continued absence of conflicting congressional action, the state regulatory and tax laws should be declared valid."

It is clear, therefore, that **Paul v. Virginia** was not overruled by **United States v. South-Eastern Underwriters Association** and that the decision in the latter case does not invalidate a state law that exacts from a foreign insurance company an excise tax imposed for the privilege of entering a state and doing business therein.

II.

THE GROSS PREMIUM TAX IMPOSED UPON FOREIGN INSURANCE COMPANIES BY SOUTH CAROLINA AND OTHER STATES IS FOR THE PRIVILEGE OF ENTERING SUCH STATES AND ENGAGING IN BUSINESS THEREIN, AND IS NOT LEVIED ON THE INTERSTATE BUSINESS OF SUCH COMPANIES AND PLACES NO UNDUE BURDEN ON INTERSTATE COMMERCE.

In addition to its interstate activities, the appellant is engaged in intrastate business in the various states in which it is engaged in business. That numerous transactions engaged in by the appellant in the state of South Carolina, as well as in other states, have a local situs and are intrastate in nature can scarcely be denied. The appellant generally maintains numerous bank accounts in the states in which it is qualified to do business, maintains and pays rent on a great number of offices in such states, employs a large number of agents, solicitors and other persons, solicits business, owns real estate, contracts with resident physicians, and generally carries on a profitable mortgage loan business within such states and, in connection with such activities, appellant has free access to the courts of the states for the purpose of enforcing its contracts and foreclosing its mortgages and defending actions and claims instituted against it. All of the above incidents of appellant's insurance business are purely local in character and appellant can not be

heard to complain of an imposition or an unjust discrimination.

Although this court held in **United States v. South Eastern Underwriters Association**, supra, that insurance companies which conducted a business across state lines were engaged in interstate commerce, it does not follow that the writing of policies of insurance on risks within a state by local representatives doing business in such state is in itself interstate commerce.

The tax in question, measured by gross premiums collected in the state of South Carolina, is for the privilege of entering the state to do ~~intrastate~~ interstate business and, consequently, does not restrict or interfere with appellant's use of the facilities of interstate commerce. The tax is not imposed on appellant's interstate activities. Its right to engage in intrastate business does not depend upon the payment of the South Carolina tax. While the tax, as stated, is measured by the gross premiums received by appellant on policies covering South Carolina risks, it must be borne in mind that it is an excise tax levied on the privilege of doing business in the state. The appellant voluntarily came into the state and requested that it be given the privilege to engage in business therein. This privilege was granted and is now exercised by the appellant.

As one of the conditions for doing business in the state appellant agreed to pay the premium tax imposed by the state statute. **Equitable Life v. Pa.**, 238 U. S., 143; **Compania Tobaccos v. Collector**, 275 U. S., 87, 98; **Conn. Gen. Life v. Johnson**, 303 U. S., 77; **Lincoln National Life v. Read**, 325 U. S. 673, 65 S. Ct., 1250. Therefore, since

the tax is an excise on the privilege of doing business in the state and on the business done by appellant in the state, it does in no manner interfere with, nor can it be a burden on, interstate commerce. The state of South Carolina has always had the right to lay and collect a tax on foreign insurance companies for the privilege of doing business in the state and such right remains unimpaired and unaffected by the decision of this court in **United States v. South-Eastern Underwriters Association.**

The fallacy of appellant's contention that it is engaged solely in interstate commerce becomes at once apparent in light of former decisions of this court.

In **Metropolitan Life Ins. Co. v. New Orleans** (1907), 205 U. S., 395, policy loans of a New York insurance company in Louisiana were held to have a taxable situs for property taxes in Louisiana. In **Engle v. O'Mally** (1911), 219 U. S., 128, the receipt of a deposit and subsequent transmission of money were held to be independent of each other and the former not interstate commerce. In **Liverpool & London & Globe Ins. Co. v. Board of Assessors of Parish of Orleans** (1911), 221 U. S., 346, credits on insurance premiums extended for thirty (30) to sixty (60) days without notes evidencing the credits were assessed for taxation. On challenge of the taxes so assessed by the insurance company, the court said at page 354:

> "* * * The credits would have no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; * * *."

and at page 357:

"• • • They were none the less enforceable credits arising in the local business."

In **Cheney Bros. Co. v. Massachusetts** (1918), 246 U. S., 147, a consolidated case involving a privilege tax upon foreign corporations, the activities of a number of corporations were considered. Some activities deemed local were keeping a stock of repair parts in Massachusetts; repairing cars and selling secondhand cars in Massachusetts; the employment of salesmen who solicited retail orders in Massachusetts; holding directors' meetings and keeping corporate records in Massachusetts; depositing money and paying it out of a bank in Massachusetts.

In **Southern Natural Gas Corp. v. Alabama** (1937), 301 U. S., 148, an annual franchise tax was imposed upon a foreign corporation which the corporation claimed would be a burden on interstate commerce. The Alabama court had construed the tax as a tax on the right to exercise corporation functions in the state. It was found that some local business was carried on by the company. The court there said (page 157):

"• • • There is no showing of any direct burden upon interstate commerce, the effect upon that commerce being incidental and remote, not differing in this respect from the effect of ordinary **ad valorem** taxation of property within the state. • • •"

Ford Motor Co. v. Beauchamp (1939), 308 U. S., 331, involved a franchise tax which the Ford Motor Company claimed was a tax upon assets used in interstate business. The court, after holding the tax a privilege tax, said at page 334:

"* * * The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. * * *".

And at page 336:

"* * * The constitution recognizes the dual interests of the national and state governments and permits taxes for local privileges upon the intrastate activities of the farflung enterprises which gain large benefits from the nationwide market, protected by the commerce clause. We reject petitioner's contention that constitutionality of state taxation turns on so narrow an issue as whether local assets rather than local gross receipts are used in a taxing formula."

Again, in **Pacific Telephone & Telegraph Co. v. Tax Commission** (1936), 297 U. S., 403, the statute imposed an occupational tax measured by the gross receipts from intrastate business. It was there claimed that all facilities were used in interstate business, that it was impossible to segregate them as to the telephone and telegraph company, so the tax was a burden on interstate commerce. The court said (page 413):

"In its effect upon interstate commerce an occupation tax solely upon local business does not differ from an **ad valorem** property tax upon tangible property used exclusively in such business. Each increases the necessary cost of doing the local business. Either might conceivably be so large as to render the local business immediately unprofitable. A common carrier can not be compelled to carry on business indefinitely at a loss. * * * If, because of such loss, a corporation, seeing no prospect of betterment, wished to discontinue its local business and

were prevented by law from doing so unless it discontinued also its interstate business, the law might be held void as imposing an unconstitutional condition upon the privilege of engaging in interstate commerce. * * * If it was the tax which caused the unprofitableness of the local business and, consequently, the desire to discontinue it, the tax would then appear as a direct burden on interstate commerce. * * * **But no reason has been suggested why a tax upon the local business should be held void, if despite its burden, the local business is conducted at a profit;** * * *." (Emphasis ours.)

In the instant case there is nothing to prevent appellant or any foreign insurance company from terminating its local business and conducting a national insurance business by mail without local taxation or license.

In **Nelson v. Sears, Roebuck & Co.**, 312 U. S., 359, the requirement that Sears, Roebuck & Co. pay Iowa a use tax upon its mail orders although those mail orders were filled in Illinois was claimed a burden on interstate commerce because other out of state mail order houses which maintained no stores in Iowa need not collect the use tax. The court answered that contention shortly by saying (page 365):

"* * * But those other concerns are not doing business in the state as foreign corporations. Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price * * *."

A clear indication that this court in **United States v. South-Eastern Underwriters Association** did not declare invalid all state statutes levying a tax on the privilege of engaging in the business of insurance in a state is the

case of **Polish National Alliance v. National Labor Relations Board**, 322 U. S., 643, wherein it was declared by Mr. Justice Frankfurter, who delivered the opinion of the court (page 649):

> "* * * The long series of insurance cases that have come to this court for more than seventy-five years, from Paul v. Virginia, 8 Wall. (U. S.), 168, 19 L. Ed., 357, to New York L. Ins. Co. v. Deer Lodge County, 231 U. S., 495, 58 L. Ed., 332, 34 S. Ct., 167, have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this court decided again and again that the making of a contract of insurance is not interstate commerce and that, since the business of insurance is in effect merely a congeries of contracts, the states may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation. Compare, for example, Heisler v. Thomas Colliery Co., 260 U. S., 245, 67 L. Ed., 237, 43 S. Ct., 83, with Sunshine Anthracite Coal Co. v. Atkins, 310 U. S., 381, 84 L. Ed., 1263, 60 S. Ct., 907."

It was said by the Supreme Court in **State of Indiana v. Prudential Insurance Co.**, 64 N. E. (2d), 150, decided December 21, 1945, that assuming that the overall pattern of the business done by most large insurance companies is interstate:

"The question is whether all activities of such a corporation are interstate and what rights the states have to regulate and tax the local aspects and activities of the business. The trend of the more recent decisions of the Supreme Court favors the states in this respect. Even the **South-Eastern Underwriters Association** opinion indicates that local activities, **even though tied into interstate business**, may be regulated and taxed by the states. **So it seems that the case that has created the doubt itself goes far to dispel the doubt**, and, as respects local phases and aspects of the business, is in line with the trend toward greater liberality for state regulation and taxation of some phases of interstate commerce.

As we have already pointed out, the Supreme Court held in the **Polish National Alliance case, supra**, that 'federal regulation does not preclude state taxation and state taxation does not preclude federal regulation.' In **Cloverleaf Butter Co. v. Patterson** (1943), 315 U. S., 148, 155, 156, 86 L. Ed., 754, 62 S. Ct., 491, the same idea is amplified in the following language:

'It has long been recognized that in those fields of commerce **where national uniformity is not essential**, either the state or federal government may act. **Willson v. Black Bird Creek Marsh Co.**, 2 Pet. (U. S.), 245, 7 L. Ed., 412; **California v. Thompson**, 313 U. S., 109, 114, 85 L. Ed., 1219, 1221, 61 S. Ct., 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of commerce which are left unregulated by the nation * * *.'"

In the case of **Southern Pac. Co. v. State of Arizona** (1945), 325 U. S., 761, decided by this court on June 18, 1945, the following language was used:

"**Although the Commerce Clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation.** Ever since **Wilson v. Black-Bird Creek Marsh Co.**, 2 Pet., 245, 7 L. Ed., 412, and **Cooley v. Board of Wardens**, 12 How., 299, 13 L. Ed., 996, it has been recognized that, **in the absence of conflicting legislation by Congress**, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. (Citing cases.)"

To the same effect, that the State may tax and regulate interstate commerce if they do not unduly burden it, see the cases of **General Trading Co. v. State Tax Commission** (1944), 322 U. S., 335, 88 L. Ed., 1309; **Parker v. Brown** (1943), 317 U. S., 341, 87 L. Ed., 315; **Illinois Natural Gas Co. v. Central Illinois Publ. Service Co.** (1942), 314 U. S., 498, 86 L. Ed., 371; **South Carolina Highway Dept. v. Barnwell Bros.** (1938), 303 U. S., 177, 82 L. Ed., 734; **California v. Thompson** (1941), 313 U. S., 109, 85 L. Ed., 1219; **Duckworth v. Arkansas** (1941), 314 U. S., 390, 86 L. Ed., 294. **McGoldrick v. Berwind-White Coal Min. Co.** (1940), 309 U. S., 33, 83 L. Ed., 585.

Considering that certain important phases of the insurance business are done within the state, that portion of the business which is interstate commerce can, under the decisions previously rendered by this court, be made to "pay its way" in the form of taxes to the states. In the case of **McGoldrick v. Berwind-White Coal Min. Co.**, 309 U. S., 33, the court sustained a New York sales tax statute as applying to coal mining in interstate commerce, Mr. Justice Stone saying (page 46):

"But it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U. S., 250, 254, 82 L. Ed., 823, 826, 58 S. Ct., 546, 115 A. L. R., 944. Not all state taxation is to be condemned because, in some manner it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress."

and again on page 49, he says:

"If, as guides to decisions we look to the purpose of the Commerce Clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of congressional action, the Commerce Clause forbids."

The foregoing, we respectfully submit, should put to rest any argument in which it is contended that the decision of this court, in United States v. South-Eastern Underwriters Association invalidates the South Carolina taxing statutes in question and those of the other states under which a premium tax is levied against foreign corporations on the privilege of engaging in the business of insurance within the state.

III.

THE STATUTES IN QUESTION, IN THAT THEY IMPOSE A TAX UPON FOREIGN INSURANCE COMPANIES, WITHOUT IMPOSITION OF A LIKE TAX UPON DOMESTIC INSURANCE COMPANIES ARE NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

It is claimed that the levy of the tax in question without the imposition of a like tax upon domestic companies operates to deny appellant the equal protection of laws under the Fourteenth Amendment to the Constitution of the United States.

It is indeed difficult to perceive how such contention can at this time be seriously advocated, in light of the recent decision of this court in **Lincoln National Life Insurance Co. v. Read**, supra, decided June 11, 1945. The appellant in said case, an Indiana insurance company, attacked the constitutionality of the Oklahoma statute which imposes a gross premium tax on foreign insurance companies and none on domestic companies. In the court's opinion, delivered by Mr. Justice Douglas, it is stated:

> "It has been held both before and after the Fourteenth Amendment that a state may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions

than it imposes on domestic companies. Paul v. Virginia, 8 Wall. (U. S.), 168, 19 L. Ed., 357; Ducat v. Chicago, 10 Wall. (U. S.), 19 L. Ed., 962; Fire Asso. of Phila. v. New York, 119 U. S., 110, 30 L. Ed., 342, 7 S. Ct., 108. But it is said that a state may not impose an unconstitutional condition — that is it may not exact as a condition an infringement or sacrifice of the rights secured to the corporation by the Constitution of the United States. The argument apparently is that since appellant is entitled to the equal protection of the laws, a condition cannot be imposed which results in its unequal and discriminatory treatment.

But that argument proves too much. If it were adopted, then the long established rule that a state may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies would go into the discard. Moreover, it has never been held that a state may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders. See Continental Assur. Co. v. Tennessee, 311 U. S., 5, 85 L. Ed., 5, 61 S. Ct., 1. That was the nature of the tax imposed in Fire Asso. of Phila. v. New York, supra. That company was licensed to do business in New York under a law which required it to pay such a tax as its home state might impose on New York companies doing business there. After it had qualified to business in New York its home state exacted from foreign corporations a tax of 3 per cent on premiums received in that state. New York accordingly followed suit. The court sustained the increased tax, saying that since the license of the foreign company was subject to the conditions prescribed by the New York statute, the amount of the tax could at any time be increased for the future. "The state, having the power to exclude entirely, has the power to change

the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given.' 119 U. S., p. 119, 30 L. Ed., 347, 7 S. Ct., 108. And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations. Hanover F. Ins. Co. v. Harding (Hanover F. Ins. Co. v. Carr), supra (272 U. S., pp. 510, 511, 71 L. Ed., 380, 381, 47 S. Ct., 179, 49 A. L. R., 713)."

The above case, even though it was not contended by the appellant therein that it was engaged in interstate commerce, is clearly and completely dispositive of the question of discrimination under the Fourteenth Amendment.

It is also claimed that the levy of this tax without the imposition of a like tax upon domestic companies, contravenes the Commerce Clause of the Constitution. But appellant was not satisfied to stand upon its federal right and do solely an interstate business. It sought a permit or franchise to carry on a local business within the state and South Carolina had the right to levy a tax for this privilege. Since the tax was not upon the privilege of doing interstate business but was a price charged for the permit to carry on a local business, it was not a direct burden upon interstate commerce. **Nelson v. Sears, Roebuck & Company**, supra; **State of Wisconsin v. J. C. Penney Company**, 311 U. S. 435 (1940); **Ford Motor Com-**

pany v. Beauchamp, supra; Southern Natural Gas Co. v. Alabama, 301 U. S. 148 (1937); Stone v. Interstate Natural Gas Co., 103 Fed. (2d), 544 (C. C. A. 5th, 1939), affirmed 308 U. S., 522.

It is, therefore, respectfully submitted that since a large share of the business conducted by the appellant in the state of South Carolina, as in other states foreign to its domicile, is purely local, the premium tax laid by such states on the privilege of engaging in the insurance business therein is not in violation of either the equal protection clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States and can not be regarded as an undue burden on interstate commerce.

IV.

BY THE ENACTMENT OF THE McCARRAN-FERGUSON ACT (PUBLIC LAW 15, 79TH CONGRESS), THE CONGRESS OF THE UNITED STATES CLEARLY RECOGNIZED THE INHERENT POWER OF THE STATES TO REGULATE AND TAX INSURANCE COMPANIES AND HAS OPENLY APPROVED ALL THEN EXISTING STATE LAWS IMPOSING TAXES UPON FOREIGN INSURANCE COMPANIES DOING BUSINESS WITHIN THE SEVERAL STATES.

There can be no substantial question of the intent of Congress in passing the McCarran-Ferguson Act. This bill was enacted at a time when Congress was being besieged with requests to clarify the status of state tax and regulatory laws with reference to insurance companies shortly after the southeastern decision of this court in U. S. v. Southeastern Underwriters Association. Congress was well aware of the condition of state tax laws. It exercised its right to regulate interstate phases and aspects of the insurance business by authorizing the states to continue their regulation and taxation of such business in the manner developed through 75 years of experience by the enactment of Public Law 15, approved March 9, 1945 (1945 U. S. Code, Service No. 2, page 31).

Said act is entitled "An act to express the intent of the Congress with reference to the regulation of the business of insurance." It specifically declares "that the con-

tinued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states."

Section 2(a) provides that "The business of insurance, * * * shall be subject to the laws of the several states which relate to the * * * taxation of such business." The laws of the several states which relate to the taxation of insurance are the very laws here under attack. The reference of the Congress is expressly to these same laws.

Section 2(b) states that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically relates to the business of insurance." Here again the Congress is referring to the very laws challenged by the appellant.

In the report of the Senate Committee on the Judiciary (Senate Report No. 15, January 24, 1945), the conclusion is made:

> "Enactment of this bill will (1) remove existing doubts as to the right of the states to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business."

In the report of the House Committee on the Judiciary (House report No. 143, February 13, 1945), the following comments are made:

> "Enactment of this bill will (1) remove existing doubts as to the right of the states to regulate and tax the business of insurance, and (2) secure more adequate regulation of such business."

In the report of the House Committee on the Judiciary (House Report No. 143, February 13, 1945), the following comments are made:

"General Statement.

From its beginning, the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states. This view has been fostered and augmented by decisions of the United States Supreme Court for a period of more than 75 years, leading to the generally accepted doctrine that the business of insurance was not subject to federal law.

On June 5, 1944, in the case of **U. S. v. Southeastern Underwriters Association**, et al., the Supreme Court decided that the business of insurance was commerce and, therefore, subject to the Sherman Act of July 2, 1890, as amended, and the Clayton Act of October 15, 1914, as amended.

* * * * * * * * *

Inevitable uncertainties which followed the handing down of the decision in the Southeastern Underwriters Association case, with respect to the constitutionality of state laws, have raised questions in the minds of insurance executives, state insurance officials, and others as to the validity of state tax laws, as well as state regulatory provisions; thus making desirable legislation by the Congress to stabilize the general situation.

Bills attempting to deal with the problem were considered in both the House and the Senate during the Seventy-eighth Congress, but failed of enactment. Your committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective states. Already many insurance companies have refused, while others have threatened refusal to comply with state tax laws, as well as with other state regulations, on the ground that to do so, when such laws

may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the Southeastern Underwriters case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds.

The committee has therefore given immediate consideration to S. 340, together with a similar measure, H. R. 1973, so that the several states may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several states, and thus enables insurance companies to comply with state laws. * * *

* * * * * * * * * *

It is not the intention of Congress in the enactment of this legislation to clothe the states with any power to regulate or tax the business of insurance **beyond** that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in **Allgeyer v. Louisiana** (165 U. S., 578). **St. Louis Cotton Compress Co. v. Arkansas** (260 U. S., 346) and the **Connecticut General Insurance Co. v. Johnson** (303 U. S., 77), which hold, **inter alia**, that a state does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the state or to regulate such transactions in any way.

Purpose of the Bill.

The purpose of the bill is twofold: (1) To declare that the continued regulation and taxation by the several states of the business of insurance is in the public interest; and (2) to assure a more adequate regulation of this business in the states by suspend-

ing the application of the Sherman and Clayton Acts for approximately two sessions of the state legislatures, so that the states and the Congress may consider legislation during that period.

Enactment of this bill will (1) **remove existing doubts as to the right of the states to regulate and tax the business of insurance**, and (2) to secure more adequate regulation of such business.". (Our emphasis.)

As a matter of logic and common sense, the language of the report would seem capable of only one interpretation: The power of the states to regulate and tax the business of insurance is to continue to the full extent to which it had been held to exist prior to the Southeastern Underwriters decision. The three Supreme Court decisions specified in the "general statement" are enumerated to illustrate what Congress conceived to be the existing valid limitations to state regulation and control which it intended to preserve. It plainly intended to recognize no further limitations.

In **Allgeyer v. Louisiana** (1897), 165 U. S., 579, defendant had secured a policy of marine insurance from a New York company not admitted to do business in Louisiana. The policy was in the nature of an open policy and required defendant to notify the company by mail upon each shipment to be covered. It was admitted the policy was contracted in New York and there was no claim that the insurance company was violating any Louisiana law. Defendant was charged, in giving a notice by mail from Louisiana as to one shipment, with violating a Louisiana statute which made it a crime to do any act in

Louisiana to effect insurance or property therein with a marine company not admitted to Louisiana. The court said the contract being valid since the state had no jurisdiction to prevent its citizens from entering into a valid contract beyond the state, the defendant under the Fourteenth Amendment to the Federal Constitution was guaranteed the liberty to give the notification required by the contract.

In **St. Louis Compress Co. v. Ark.** (1922), 260 U. S., 346, it was held that Arkansas could not tax the defendant upon a policy contracted for, delivered and paid for in Missouri upon defendant's property in Arkansas where no transactions occurred in Arkansas.

In **Connecticut General Life Insurance Co. v. Johnson** (1938), 303 U. S., 77, California taxed the insurance company upon premiums for reinsurance contracts entered into in Connecticut by the plaintiff with other companies on their California business. The reinsurance contracts called for no act in California and involved no relationship between plaintiff and those originally insured. The court said there was no privilege conferred by California in such transactions and California had no jurisdiction to tax. The principles involved in those cases are largely due process.

In the debate in the Senate preceding the passage of the bill, Senator Joseph C. O'Mahoney was the final speaker. He made this unchallenged statement before the vote was taken:

> "We are extending to the states, complete immunity for their state tax law, * * *." 91 Cong. Rec., 509.

Senator Ferguson also stated that:

> "The language of the bill makes clear the purpose of the legislation, that the taxation problem will be taken care of, and there will be no excuse for **paying under protest** or not paying at all." Vol. 91, No. 15, p. 504. (Our emphasis.)

In the case of **State of Indiana v. The Prudential Insurance Company**, supra, and **In Re Insurance Cases**, Supreme Court of Kansas, 161 Pac. (2d), 726, and also in **Prudential Insurance Co. v. Forbes**, decided August 21, 1945, by the Circuit Court of Ingham county, Michigan, it was held that the intention of Congress was to permit the continued enforcement of the tax laws as they existed prior to and at the time of the Southeastern Underwriters decision.

B. Congress Has Power to Authorize the States to Continue the Taxation of the Insurance Business as Judicially Sanctioned Prior to the Southeastern Decision.

We shall proceed to consider the power of Congress to authorize the continued taxation of the insurance business by the states as judicially sanctioned prior to the Southeastern decision. While, as hereinbefore shown, the state statutes taxing foreign insurance companies are not invalidated by the decision of this court in **U. S. v. South-Eastern Underwriters Association**, there is no question but that it was nevertheless clearly within the competency of Congress to pass the McCarran Act. In other words if Congress out of abundance of caution felt

impelled to pass a law which expressly sanctioned a tax laid on foreign insurance companies by the states, it was clearly within the domain of that body to do so. This power has been exercised on several occasions and with regard to various subjects of interstate commerce. It has been manifested in a number of different forms; it has been litigated at different times and on different aspects, without exception it has been sustained.

A recent statement of the Supreme Court of the United States is found in **Cloverleaf Butter Co. v. Patterson** (1942), 315 U. S., 148, where the court said (page 155):

> "Where the federal legislation **authorizes** state action, such state action is permissible **even as to matters which could otherwise be regulated only by uniform national enactments. In Re Rahrer (Wilkerson v. Rahrer)**, 140 U. S., 545, 561; **Clark Distilling Co. v. Western Maryland Ry. Co.**, 242 U. S., 311, 325 et seq.; **Whitfield v. Ohio**, 297 U. S., 431; **Kentucky Whip & Collar Co. v. Illinois Central R. Co.**, 299 U. S., 334, 350."

The principle that Congress may authorize state control over interstate commerce was first announced in **Cooley v. Port Wardens** (1851), 53 U. S., 299, which involved the validity of a Pennsylvania state tax imposed on vessels sailing from Philadelphia to any port not within the Delaware River without a pilot, where a pilot was available. In 1789 Congress had enacted a law providing that all pilots in the rivers and harbors of the United States should continue to be regulated in conformity with the existing laws of the state until further legislative provisions should be made by Congress. The Pennsylvania statute was passed subsequent to the fed

eral act and its validity therefore could not be sustained on the theory that Congress had merely adopted the state laws as its own. It was conceded that while the regulation of pilots had always been regarded as a local matter (as has the business of insurance) not requiring uniform regulations, Congress nevertheless had the power to regulate it under the commerce clause. The question was whether it could permit regulation by the states. It was said (page 317):

> "If the states were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the states from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the states that power. And yet this Act of 1789 gives its sanction only to laws enacted by the states. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a state acting in its legislative capacity, can be deemed a law, enacted by a state; and if the state has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did **per se** deprive the states of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter. If they are excluded it must be because the nature

of the power, thus granted to Congress, requires that a similar authority should not exist in the states. If it were conceded on the one side, that the nature of this power like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the states, probably no one would deny that the grant of the power to the Congress, as effectually and perfectly excludes the states from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, and after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulation. **Sturges v. Crowninshield**, 4 Wheat., 193; **Moore v. Houston**, 5 Id., 1; **Wilson v. Black Bird Creek Co.**, 2 Pet., 251.

* * * * * * * * *

Viewed in this light, so much of this Act of 1789 as declares that pilots shall continue to be regulated 'by such laws as the states may respectively hereafter enact for that purpose,' instead of being held to be inoperative, as an attempt to confer on the states a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. **It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation.** * * *

> It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the states of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. * * *." (Our emphasis.)

In the case of state taxation of the insurance business, the Congress has recognized that "the nature of this subject is not such as to require its exclusive legislation."

An analogous situation arose in **Van Allen v. The Assessors** (1865), 70 U. S., 573, involving state taxation of a national banking association created under an Act of Congress. The national banking act as amended in 1864 had provided for state taxation of those shares. However, it was contended by the shareholders that since all of the capital in the bank invested in stock and bonds of the United States, the shares of bank stock could not be taxed and it was said that Congress possessed no power to confer upon the state authority to tax which had been delegated to Congress by the Constitution. The court said at page 585:

> "* * * We agree to this. But as it respects a subject-matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the states, there is no doubt Congress may withhold the exercise of that authority and leave the states free to act. * * *"

Wilkerson v. Rahrer (In Re Rahrer) (1891), 140 U. S., 545, marks the next development of the principle.

The Wilson Act provided that the sale of liquor shipped in interstate commerce should be subject to the law of the state into which it was shipped, notwithstanding that the original package remained unbroken. It was contended that the act was invalid because it purported to delegate the powers of Congress to the states. The court conceded that a delegation of federal power to the states could not be valid but held that a federal statute permitting state laws to operate, notwithstanding the complete power of Congress to occupy the field, did not constitute a delegation of federal power. The court said (page 560):

> "It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the manner of interstate commerce, operates **ex proprio vigore** as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the state. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the states in all things, and that not only may intoxicating liquors be imported from one state into another without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.
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> * * * * * * * *
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> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.
>
> * * * * * * * *

> The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void.
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> * * * * * * * *
>
> Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

Clark Distilling Co. v. Western Maryland R. Co. (1917), 242 U. S., 311, involved the validity of the Webb-Kenyon Act, which, going a step beyond the Wilson Act, prohibited the shipment of intoxicating liquor into any state whose law prohibited the sale of liquor. It was argued that Congress could permit state regulation only as to subjects which required no uniformity of state action and which the states were therefore free to regulate if Congress remained silent, and that as to subject where uniformity would be required Congress is wholly without power to provide for the application of state power to any degree whatever, because in the absence of federal legislation, the subject-matter would be free from state control. The court said (page 328):

> "* * * But granting the accuracy of the two classifications which the proposition states, **the limitation upon the power of Congress to regulate which is deduced from the classifications finds no support**

in the authority relied upon to sustain it. . . . (Emphasis ours.)

. . . . . .

Before concluding we come to consider what we deem to be arguments of inconvenience which are relied upon, that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control and therefore destroys the Constitution. **The want of force in the suggested inconvenience becomes patent by considering the principle which after all dominates and controls the question here presented, that is, the subject regulated and the extreme power to which that subject may be subjected.** The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guarantees such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace." (Our emphasis.)

The language last quoted suggests the only limitation on the doctrine under consideration if any exists, namely, that the subject matter be one peculiarly subject to the regulatory powers of the state when state commerce is not involved. That the business of insurance falls within

this category has not been doubted for many years. The existence of such power in the states was upheld in **German Alliance Insurance Company v. Kansas** (1914), 233 U. S., 389, in which the court referred to the widespread recognition of the need for regulation of the insurance business. That the business has been recognized for more than seventy-five years as local (and subject to local tax and regulatory statutes) clearly differentiates it from the business of dealing in ordinary commodities and it is wholly unnecessary to consider the power of Congress to permit state taxation and regulation of the latter. The long history of local regulation of the insurance business also demonstrates a lack of necessity for uniform regulation but under the rule laid down in the foregoing case even if it might otherwise be thought that uniform regulation were necessary, Congress may dispense with uniformity by consenting to state action.

In **Whitfield v. Ohio** (1936), 297 U. S., 431, the same principle was applied to uphold the Hawes-Cooper Act providing that goods manufactured by convicts and transported into another state should be subject to the laws of such state to the same extent as though manufactured there. The court pointed out that such legislation proceeds upon the view that free labor properly compensated cannot compete successfully with convict labor and that Congress had the power to, and had by the act, removed the impediment to state control which would otherwise have existed because of the interstate shipment. It was said (page 440):

> "If the power of Congress to remove the impediment to state control presented by the unbroken-package doctrine be limited in any way (a question

which we do not now find it necessary to consider), it is clear that the removal of that impediment in the case of prison-made goods must be upheld for reasons akin to those which moved this court to sustain the validity of the Wilson Act. * * *" (Emphasis ours.)

Kentucky Whip & Collar Co. v. Illinois C. R. Co. (1937), 299 U. S., 334, involved the validity of the Ashurst-Summers Act with reference to convict-made goods. This differed from the Hawes-Cooper Act in the same way that the Webb-Kenyon Act differed from the Wilson Act with reference to intoxicating liquors, making it unlawful to transport the goods into a state where they were intended to be received, possessed, sold or used in violation of state law. The court said (page 351):

"* * * The pertinent point is that where the subject of commerce is one as to which the power of the state may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees **fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy.**

In the congressional action there is nothing arbitrary or capricious bringing the statute into collision with the requirements of due process of law. The Congress in exercising the power confided to it by the Constitution is as free as the states to recognize the fundamental interests of free labor. Nor has the Congress attempted to delegate its authority to the states. The Congress has not sought to exercise a power not granted or to usurp the police powers of the states. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power,

which is subject to no limitation other than that which is found in the Constitution itself. The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection." (Emphasis ours.)

Neither is there anything arbitrary or capricious in a determination that the national interest is best served by permitting the states to continue functions with reference to the business of insurance in the same manner and to the same extent as they had for more than seventy-five years prior to June 5, 1944, with the uniform approval of the decisions of the Supreme Court.

A further exercise of the power of Congress to consent to state regulation was upheld in **Safe Harbour Water Power Corp. v. Federal Power Commission** (C. C., 93, 1941), 124 F. (2d), 800, cert. den. 316 U. S., 663. There the court upheld Section 20 of Part I of the Federal Power Act providing that jurisdiction of hydro-electric power rates in interstate commerce was lodged in the Federal Power Commission only where the states directly involved had not provided a commission or other authority to regulate rates or had been unable through their properly constituted authorities to agree on the rates. The validity of this provision was attacked on the ground that Congress had no power to consent to the fixing of rates in interstate commerce by state commissions and agencies, and sustained. It was said (page 806):

"We conclude that it was the intention of Congress to regulate hydro-electric power by state com-

missions using the federal agency set up in Section 20 only where the state commissions did not or could not perform the function expected of them.

Could Congress provide for the regulation of hydro-electric power coming into the states in interstate commerce by state commissions? * * * .

There is no doubt that Congress cannot delegate the power of the central government to regulate interstate commerce to a state or state agency. It should also be borne in mind that in the case at bar we need not concern ourselves with the doctrine of the silence of Congress for Congress has spoken in Section 20. When Congress enacted Section 20 in 1920 it had before it the decision of the Supreme Court in the Pennsylvania Gas Co. case. When Congress reenacted the section in 1935, the Supreme Court had decided not only **State of Missouri v. Kansas Natural Gas Co.**, 265 U. S., 298, 44 S. Ct., 544, 68 L. Ed., 1027, but the Attleboro case as well. **But there always has been a field where, Congress permitting, the police powers of the states might operate. Examples of this are manifold.** This has been true in many cases even where state action apparently has been in conflict with congressional action and the Supreme Court has held none the less that there remains a regulatory field in which the state may act. A cogent illustration lies in the decision of the Supreme Court in **Clark Distilling Co. v. Western Md. Ry. Co.**, 242 U. S., 311, 325-332, 37 S. Ct., 180, 61 L. Ed., 326, L. R. A. 1917B, 1218 Ann. Cas. 1917B, 845, passing upon the application of the Webb-Kenyon Law, 37 Stat., 699, 27 U. S. C. A., Section 122, which held in effect that Congress might throw an interstate shipment of infoxicating liquors into interstate commerce as it passed the state line, the use to which the shipment was then to be put becoming a matter of local concern and the police power of West Virginia operating in respect to it. There is an analogy between the Clark Distilling case and that at bar for the consumption of

power is a local matter, almost as if a package of power had been delivered at the state line. **The case at bar, however, is a stronger case for the exercise of state police power for in the instant case Congress has spoken and specifically has given permission for the exercise of state power. There is a field in which state power may act upon the products of interstate commerce and though that field is difficult to delimit we think that Congress intended to base Section 20 upon it and could do so without violation of the commerce clause of the Constitution** * * *" (Emphasis ours.)

An attempt may be made to distinguish between the power of Congress to permit **state regulation** of the insurance business as in the past, and the power to permit **state taxation** as it existed before the Southeastern case.

A brief consideration of the principle on which state tax statutes have been invalidated as burdening interstate commerce demonstrates that there is no merit in such an attempted distinction. As heretofore recognized, the Commerce Clause vests in Congress the right to regulate interstate commerce, and the vesting of such right in Congress by the Constitution necessarily deprives the state of the power to infringe the authority of Congress. Consequently, taxes which impose undue burdens on interstate commerce ordinarily amount to a regulation by the state of interstate commerce which "infringes the authority conferred upon Congress." But, as stated by the Supreme Court of the United States in **McGoldrick v. Berwind-White Company**, supra: "It is only when the tax operates to **regulate** commerce between the states * * * **to an extent which infringes the author-**

ity conferred upon Congress that the tax can be said to exceed constitutional limitations." Hence, state tax laws have been held to exceed constitutional limitations not because they imposed taxes on interstate commerce but because they operated to regulate interstate commerce to an extent which infringed the authority of Congress. It necessarily follows that wherever Congress has the power to authorize state regulation by withdrawing any impediment which the Commerce Clause would impose in the absence of such authority, there can be no valid contention that state taxation of the subject matter operates to regulate commerce to an extent which "infringes the authority conferred upon Congress." Consequently it may withdraw the impediment to the exercise by the state of the taxing power to precisely the same extent that it may withdraw the impediment to the exercise by the state of its regulatory power. The two principles go hand in hand and there can be no sound principle which would support the right of Congress to authorize state regulation which would otherwise be prevented by the Commerce Clause and at the same time deny the right to authorize state taxation which would otherwise be prevented by the Commerce Clause. No specific decision has been cited in which the principle of congressional authorization was applied to state taxation where the question of interstate commerce was involved, although the same principle was applied in **Van Allen v. The Assessors**, 70 U. S., 5, 73, with reference to the power of Congress to authorize state taxation of federal instrumentalities which otherwise could not be taxed by the states without the consent of Congress.

But while cases involving territories are not completely analogous, a compelling indication of judicial thought with respect to congressional consent to taxation of interstate or foreign commerce is found in **Inter-Island Co. v. Hawaii** (1938), 305 U. S., 306. Petitioner then complained of a tax upon it levied under the Hawaiian Utilities Act of 1913 which had been approved by Congress. It was claimed that the tax burdened interstate and foreign commerce. The court said at page 313 as one of the grounds of the decision:

> "Under the Constitution, Congress has the power to regulate interstate commerce. Therefore, assuming—but not deciding—that petitioner is engaged in interstate and foreign commerce, Congress has exercised its power in the present case by permitting the Territory to act upon this commerce by the imposition of the contested taxes. The imposition of these taxes under an act of Congress expressly subjected petitioner does not violate the Commerce Clause."

And compare **McGoldrick v. Gulf Oil Corp.** (1939), 309 U. S. 414, with **West India Oil Co. v. Dommel** (1940), 311 U. S., 20. In the first case, the New York sales tax levied in **McGoldrick v. Berwind White Coal Co.** was held an unconstitutional burden on commerce as applied to crude oil imported in bond under the provisions of the Tariff Act of 1930 and of the Revenue Act of 1932.

In the second case the Puerto Rican sales tax was held applicable to importations of fuel oil in bond under the same federal acts because an amendment to the Organic Act of Puerto Rico permitted such taxation. The purpose of that amendment was said to be a removal of the

original package impediment to territorial taxation. The tax was sustained.

If the tax could be sustained in the last case, because of congressional consent in spite of federal legislation involving the same subject under the Tariff and Revenue Acts and upon an article inherently exempt from local taxation, **a fortiori** the tax should be sustained in the case at bar.

In **Prudential Insurance Company v. Forbes, Commissioner,** recently decided by the Circuit Court of Ingham county, Michigan, which involves the identical question presented here, the validity of the congressional act is apparently assumed since only its construction to authorize state taxation of the character involved here is discussed in the opinion. A further definite intimation of the validity of such a federal law as applied to state taxes is found in the dissenting opinion of Justice Brandeis in **Ozark Pipe Line v. Monier,** 266 U. S., 555. At page 567 he said:

> "* * * Under the rule applied, every tax laid by any state upon the corporate franchise (properly so-called) of every corporation, domestic or foreign, must be void, **in the absence of congressional authorization,** where the corporation is actually engaged exclusively in what is deemed interstate commerce. I find in the Constitution no warrant for the assumption which leads to such a result." (Emphasis ours.)

His statement would indicate his impression that unquestionably the power of Congress to authorize state taxation such as that authorized by Public Law No. 15 would be sustained as a proper exercise of the power of Congress to regulate interstate commerce.

C. If Any Serious Question Could Be Raised as to the Validity of the Established Laws of the States Taxing Foreign Insurance Companies Doing Business Within Their Borders, a Proposition Which We Emphatically Deny, Such Question Is Put at Rest by the McCarran-Ferguson Act.

It is to be noted that there has been no decision by the Supreme Court that Congress cannot give its consent to discriminatory action; while there have been judicial expressions to the effect that Congress can effectuate otherwise unconstitutional state tax laws by consenting to the continued operation of such state laws.

The language of this court in **White & Prince v. Hennifford**, 305 U. S., 434, wherein it is said:

> "But it is not enough for present purposes that under the Commerce Clause, in the absence of congressional action, state taxation whatever its form, is precluded if it discriminates against interstate commerce * * *".

indicates a recognition of the power of Congress to validate state laws which otherwise discriminate against interstate commerce. See also **Welton v. Missouri**, 91 U. S., 275, wherein the court said with respect to the Commerce Clause:

> "* * * The power to regulate, conferred by that clause upon Congress, is one without limitation; and to regulate commerce is to prescribe rules by which it shall be governed — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, **how far it shall be burdened** by duties and imposts, and how far it shall be prohibited." (Emphasis ours.)

In **Finch & Co. v. McKittrick**, 305 U. S., 395, the Twenty-First Amendment which embodied the Webb-Kenyon Act, was held to permit discriminatory and retaliatory action by one state against the products of another state.

To the same effect is **International Shoe Co. v. State of Washington, et al.**, decided by this court December 3, 1945, wherein the following language is used:

> "Appellant's argument, renewed here, that the statute imposes an unconstitutional burden on interstate commerce need not detain us. For 53 Stat. 1931, 26 U. S. C., Section 1606(a) provides that 'No persons required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce, and those engaged in intrastate commerce.' **It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. Kentucky Whip & Collar Co. v. Illinois Central R. Co.**, 299 U. S., 334; **Perkins v. Pennsylvania**, 314 U. S., 586; **Standard Dredging Co. v. Murphy**, 319 U. S., 306, 308; **Hooven & Allison Co. v. Evatt**, 324 U. S., 652, 679; **Southern Pacific Co. v. Arizona**, No. 56, 1944 Term, decided June 18, 1945, slip opinion, p. 6." (Our emphasis.)

The foregoing authorities unquestionably establish the competency of Congress to pass the McCarran-Ferguson Act, which is declarative of the 75 year old policy of state taxation of foreign insurance companies, as consistently upheld by this court.

CONCLUSION.

We do not gainsay the fact that the laws of many of the states which lay a premium tax on foreign insurance companies appear on their face to discriminate between foreign and domestic companies. We do, however, emphatically deny that such discrimination constitutes an unconstitutional discrimination, or places on interstate commerce an unconstitutional burden. The mere fact that a state premium tax falls with disproportionate weight upon the business done within a state by an out of state insurance company does not place such company at a competitive disadvantage. The fact is that the burden, whatever it is, was not imposed by the state with any design against interstate commerce as such because, at the time of the enactment of our state premium tax laws, the business of insurance was not regarded as falling within the category of commerce. Since the premium tax, imposed as an annual license for the privilege of doing business within the state, was by its very origin and nature not intended as a hostile thrust at interstate commerce, it clearly devolved upon the appellant as a consequence of its own theory to show that the tax constitutes a substantial burden. This the appellant has failed to do and its failure need surprise no one. If the tax is to be called a burden, it nevertheless was one voluntarily and gladly assumed by the appellant year after year, as a result of its own initiative and enterprise, and a burden which, in view of the record as to its volume of business within the state, rests upon it very lightly. The

assertion that a tax voluntarily accepted and paid year after year as the price of carrying on business of its own eager seeking places the appellant at a competitive disadvantage with respect to that business is, to say the least, bewildering as an argument. As a proposition needing to be established by evidence to win judicial acceptance, it would seem quite hopeless.

The unreality of the entire argument with respect to the burden of this or any other so-called discriminatory state tax on foreign insurance companies is well exemplified by the statement of the Indiana Supreme Court in **State of Indiana v. Prudential Insurance Co.**, supra. Commenting upon the business of **this same appellant** in Indiana, the court said:

> "Appellee was first authorized and licensed to do business in Indiana in 1903 and at that time there was, and continuously since 1891 there has been, in effect in Indiana a premium tax law substantially the same as above quoted.
>
> Since 1903 appellee has developed a very large insurance business in Indiana. On December 31, 1944, it maintained 54 district offices in Indiana wherein 256 persons were employed and it had 636 agents engaged in selling insurance in Indiana and 347 physicians who examined applicants for policies. At that time, it had in force 1,332,785 policies insuring the lives of approximately 866,000 persons resident in Indiana for a total amount of over $726,000,000. During the year ending December 31, 1944, it sold and issued and delivered policies insuring the lives of approximately 74,000 persons resident in Indiana for a total amount of $81,915,223, and during that year it paid over $7,000,000 in claims on policies upon the lives of Indiana residents. It had over $619,000 deposited in Indiana banks.
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Appellee contends that in the light of the Supreme Court opinion in **United States v. South-Eastern Underwriters Assn.** (1944), 322 U. S., 533, 88 L. Ed., 1440, 64 S. Ct., 1162, the premium tax authorized by the Indiana statute violates the Commerce Clause of the federal Constitution and the equal protection clause of the Fourteenth Amendment. In our consideration of these contentions we have had in mind, in addition to the facts already mentioned, that when appellee first entered Indiana to do business the same three (3) per cent premium tax was imposed by our statutes that is imposed today, and that it came and has stayed voluntarily and has prospered and has built up a business in Indiana that in 1944 was more than double the Indiana business of all life insurance companies organized in Indiana put together. It has paid this tax continuously every year without protest or objection. It has adjusted its Indiana business to the requirements of the statute without finding the burden too heavy or practically discriminating, and Indiana has adjusted its fiscal policy and governmental financing to the income so derived and has evolved through the years a tax structure of which this premium tax, with 108 foreign life insurance companies doing business in Indiana, has become an indispensable part." (Emphasis ours.)

The tax complained of in the instant case is imposed under the constitutional power of the state of South Carolina to tax foreign corporations for the privilege of entering the state to do business within its borders. It is not laid on commerce between the states and, consequently, does not unconstitutionally burden or restrict interstate commerce, and the long, unbroken line of decisions of this court, which have so held, stand undis-

turbed and unimpaired by **United States v. South-Eastern Underwriters Association.**

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 707.—October Term, 1945.

The Prudential Insurance Company, Appellant, *vs.* L. George Benjamin, as Insurance Commissioner of the State of South Carolina.	Appeal from the Supreme Court of the State of South Carolina.

[June 3, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case and *Robertson* v. *California*, No. 274, decided today, bring not unexpected sequels to *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533. In cycle reminiscent conversely of views advanced there and in *Paul* v. *Virginia*, 8 Wall. 168, claims are put forward on the basis of the *South-Eastern* decision to sustain immunity from state taxation and, in the *Robertson* case, from state regulation of the business of insurance.

The specific effect asserted in this case is that South Carolina no longer can collect taxes from Prudential, a New Jersey corporation, which for years prior to 1945 the state had levied and the company had paid. The tax is laid on foreign insurance companies and must be paid annually as a condition of receiving a certificate of authority to carry on the business of insurance within the state. The exaction amounts to three per cent of the aggregate of premiums received from business done in South Carolina, without reference to its interstate or local character.[1] No similar tax is required of South Carolina corporations.[2]

[1] The statutes imposing the tax are §§ 7948 and 7949, South Carolina Code of 1942. Each section in fact imposes a separate tax, the former of two per cent, the latter of one per cent, on gross premium returns "from the State," with provisions under § 7948 for reduction in the amount of the tax scaled to specified investments in South Carolina securities or property. Both taxes are laid "in addition to the annual license fees now provided by law," and are stated in terms to be required "as an additional and graded license fee" (§ 7948) or as "a graduated license fee." § 7949. The two taxes have been treated in combination, for purposes of this litigation, as being in effect a single tax of three per cent.

[2] Sections 7948 and 7949 expressly exempt South Carolina corporations from payment of the tax. They however are subject to other taxes, which Prudential maintains have no bearing upon the issues, other than possibly

Prudential insists that the tax discriminates against interstate commerce and in favor of local business, since it is laid only on foreign corporations and is measured by their gross receipts from premiums derived from business done in the state, regardless of its interstate or local character. Accordingly it says the tax cannot stand consistently with many decisions of this Court outlawing state taxes which discriminate against interstate commerce.[2] South Carolina denies that the tax is discriminatory[4] or has been affected by the *South-Eastern* decision. But in any event it maintains that the tax is valid, more particularly in view of the McCarran Act,[5] by which it is claimed Congress has consented to continuance of this form of taxation and thus has removed any possible constitutional objection which otherwise might exist. This Prudential asserts Congress has not done and could not do.

The State Supreme Court has held the continued exaction of the tax not to be in violation of the commerce clause or affected by the ruling made in the *South-Eastern* case.— S. C. —; 35 S. E. 2d 586. That holding presents the principal basis for this appeal.

I.

The versatility with which argument inverts state and national power, each in alternation to ward off the other's incidence,[6] is not simply a product of protective self-interest. It is a recurring

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to demonstrate the discriminatory character and effects of the exaction in issue. See note 36. These are chiefly taxes on real and personal property, incidence of which Prudential largely escapes by the location of its property in other states.

[3] Extending from Welton v. Missouri, 91 U. S. 275, to Nippert v. Richmond, 326 U. S. —. See the collection of authorities in McGoldrick v. Berwind-White Co., 309 U. S. 33, 56, n. 11.

[4] In apparent reliance not only upon decisions rendered prior to the South-Eastern decision or made without reference to its ruling, e. g., Lincoln National Ins. Co. v. Read, 325 U. S. 673; Bethlehem Motors Corp. v. Flynt, 256 U. S. 421; but indeed also Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648; and like authorities.

The state also maintains that Prudential's South Carolina business is not altogether interstate commerce but consists, in substantial part, of local transactions, the aggregate of which measures the tax, for which view it relies upon such diverse decisions as McGoldrick v. Berwind-White Co., 309 U. S. 33; International Shoe Co. v. Shartel, 279 U. S. 429; Western Live Stock v. Bureau of Revenue, 303 U. S. 250; and Polish National Alliance v. National Labor Relations Board, 322 U. S. 643. See note 36 and text.

[5] The pertinent portions of the Act are set forth in the text, Part III, at note 37.

[6] Cf. United States v. South-Eastern Underwriters, 322 U. S. 533, at notes 9 and 23; but see also note 33 for an early and highly authoritative but less mutually exclusive view of the possible alternatives.

manifestation of the continuing necessity in our federal system for accommodating the two great basic powers it comprehends. For this Court's part, from *Gibbons* v. *Ogden*, 9 Wheat. 1, no phase of that process has been more continuous or at times perplexing than reconciling the paramount national authority over commerce, created by Article I, § 8 of the Constitution, with appropriate exercise of the states' reserved powers touching the same or related subject matter.[7]

The continuing adjustment has filled many of the great constitutional gaps of Marshall's time and later.[8] But not all of the filling has been lasting. Great emphases of national policy swinging between nation and states in historic conflicts have been reflected, variously and from time to time, in premise and therefore in conclusion of particular dispositions.[9] In turn, their sum has shifted and reshifted the general balance of authority, inevitably producing some anomaly of logic and of result in the decisions.

No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence. Moreover, in law as in other phases of living, reconciliation of anomalous behavior, long continued, with more normal attitudes is not always easy, when the time for that adjustment comes.

Essentially, the problems these cases tender are of that character. It is not necessary to renew the controversy presented in *South-Eastern*. Whether or not that decision properly has been characterized as "precedent-smashing,"[10] there was a reorientation of attitudes toward federal power in its relation to

[7] Among the volumes which have been written, special reference may be made to Frankfurter, The Commerce Clause (1937); Ribble, State and National Power over Commerce (1937); Gavit, The Commerce Clause (1932); and see Dowling, Interstate Commerce and State Power (1940) 27 Va. L. Rev. 1. For thoughtful comment since the South Eastern decision, see Patterson, The Future of State Supervision of Insurance (1944) 23 Tex. L. Rev. 18; Note, Congressional Consent to Discriminatory State Legislation (1945) 45 Col. L. Rev. 927.

[8] "Judges legislate interstitially and the interstices were great in Marshall's time." Ribble, State and National Power over Commerce (1937) 47.

[9] "Lines of demarcation are drawn largely according to the pull of the Court at one period towards the interests of local self-government, and at another in the direction of a nation-wide rule." Frankfurter, The Commerce Clause (1937) 97.

[10] S. Rep. No. 1112, 78th Cong., 2d Sess. 2.

the business of insurance conducted across state lines. Nece[illegible] this worked in two directions. As the opinion was at [illegible] note, 322 U. S. 533, 545 ff., no decision previously had [illegible] invalid an Act of Congress on the ground that such business [illegible] beyond reach of its power, because previously no attempted exercise of that authority had been brought here in litigation. [illegible] from *Paul* v. *Virginia* to *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U. S. 495, negative implication from the commerce clause was held not to place any limitation upon state power over the business, however conducted with reference to state lines. And correlatively this was taken widely, although not universally, to nullify federal authority until the question was squarely presented and answered otherwise in the *South-Eastern* case.

Whether *Paul* v. *Virginia* represented in its day an accommodation with or a departure from the preexisting evolution of commerce clause law and whether its ruling, together with later ones adhering to it, remained consonant with the subsequent general development of that law, may still be debated. But all may concede that the *Paul* case created for the business of insurance a special, if not a wholly unique, way of thinking and acting in the regulation of business done across state lines. See Ribble, State and National Power over Commerce (1937) 89, 186-187. The aegis of federal commerce power continued to spread over and enfold other business so conducted, in both general and specific legislative exertions. Usually this was with judicial approval; and, despite notable instances of initial hostility, the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory.[11] The plain words of the grant have made courts cautious, except possibly in some of the instances noted, about nullifying positive exertions of Congress' power over this broad and hard to define field. At the same time, physical and economic changes in

[11] E. g., Hammer v. Dagenhart, 247 U. S. 251, overruled by United States v. Darby, 312 U. S. 100; compare United States v. E. C. Knight Co., 156 U. S. 1, with United States v. American Tobacco Co., 221 U. S. [illegible]; Schechter Corp. v. United States, 295 U. S. 495, with National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1. See also discussion in Wickard v. Filburn, 317 U. S. 111, 118 ff.

See Ribble, State and National Power over Commerce (1937) 63, n. 38, for listing of the decisions invalidating Acts of Congress prior to 1879, noting that Mr. Justice Miller was "but slightly in error" in the statement, in Trade Mark Cases, 100 U. S. 82, 96, that one then might count "on the fingers" those decisions.

the way commerce is carried on has called forth a constantly increasing volume of legislation exercising that power.[12]

Concurrently with this general expansion, however, from *Paul* to *South-Eastern* the states took over exclusively the function of regulating the insurance business in its specific legislative manifestations. Congress legislated only in terms applicable to commerce generally, without particularized reference to insurance. At the same time, on the rationalization that insurance was not commerce, yet was business affected with a vast public interest,[13] the states developed comprehensive regulatory and taxing systems. And litigation of their validity came to be freed of commerce clause objections, at any rate from *Deer Lodge* on to *South-Eastern*. Due process in its jurisdictional aspects remained to confine the reach of state power in relation to business affecting other states.[14] But the negative implications of the commerce clause became irrelevant, as such, for the valid exercise of state regulatory and taxing authority.

Meanwhile the business of insurance experienced a nation-wide expansion graphically depicted not only in the facts of the situation presented in the *South-Eastern* case but also in the operations of Prudential as described by its advocates in this cause.[15] These divergent facts, legal and economic, necessarily were re-

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[12] Beginning in modern phase with enactment of Interstate Commerce Commission and Anti-Trust legislation near the beginning of the present century. The catalogue is now too long to repeat here.

[13] See German Alliance Ins. Co. v. Kansas, 233 U. S. 389, 414, 415; La Tourette v. McMaster, 248 U. S. 465, 467; National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 74; cf. Osborn v. Ozlin, 310 U. S. 53, 65: "Government has always had a special relation to insurance." See also United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, dissenting opinion at 585.

[14] See Allgeyer v. Louisiana, 165 U. S. 578; New York Life Ins. Co. v. Head, 234 U. S. 149; Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426; St. Louis Compress Co. v. Arkansas, 260 U. S. 346; Hoopeston Co. v. Allen, 318 U. S. 313; Powell, The Supreme Court and State Police Power, 1922-1930 (1932) 140 *et seq.*; also St. Louis Southwestern Ry. Co. v. Alexander, 227 U. S. 218, with which compare Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) c. V. Cf. Harvester Co. v. Dept. of Treasury, 322 U. S. 340, concurring opinion, 349, at 353 ff.; and see International Shoe Co. v. Washington, 326 U. S. —.

[15] According to Prudential's brief, it transacts business in all forty-eight states and on December 31, 1944, "had in force 33,933,077 policies, insuring approximately 22,900,000 persons, for a total amount of $22,741,434,075; and 36,733 annuity contracts operative during the lives of approximately 300,000 persons and providing for an annual income of approximately $63,200,000 on such lives. During the year 1944 the Appellant issued 2,412,150 policies, insuring the lives of approximately 2,170,000 persons.

flected in state legislation. States grappling with nation-wide, but nationally unregulated, business inevitably exerted their powers to limits and in ways not sought generally to be applied to other business held to be within the reach of the commerce clause's implied prohibition. Obvious and widespread examples are furnished in broad and detailed licensing provisions, for the doing of business within the states, and in connected or distinct taxing measures drawn in apparent reliance upon freedom from commerce clause limitations.[16]

Now we are told many of these statutes no longer can stand. The process of readjustment began affirmatively with *South-Eastern*. Since the commerce clause is a two-edged instrument, the indicated next step, indeed the constitutionally required one, as the argument runs, is to apply its negatively cutting edge. Conceptions so developed with reference to other commerce must now be extended to the commerce of insurance in completion of the readjustment. This, it is confidently asserted, will require striking down much of the state legislation enacted and effective prior to the *South-Eastern* decision. Particularly will this be true of all discriminatory state taxes, of which it is said South Carolina's is one. Moreover, those results must follow regardless of the McCarran Act's provisions. For by that Act, in Prudential's assessment, Congress neither intended to, nor could, validate such taxes.

It is not surprising that the attack is thus broad. When a decision is conceived as precedent-smashing, rightly or wrongly, the conception's invitation may be to greater backtracking than is

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in the total amount of $2,668,714,022; and entered into 451 annuity contracts operative during the lives of approximately 600 persons and providing for an annual income of approximately $150,000 on such lives. During the year 1944 the Appellant collected as premiums on insurance policies $681,052,095.07, and paid out as claims on policies $246,776,197.45; and it paid out $13,699,781.93 on annuity contracts."

For South Carolina, the company "had in force 26,373 policies insuring the lives of approximately 20,000 persons resident in said State for a total amount of $30,827,184.00. During the year ending December 31, 1944, 1,400 policies insuring the lives of approximately 1,000 persons resident in said State for a total amount of $1,475,062.00 were issued, and $457,602.28 in claims were paid on policies covering the lives of residents." The South Carolina premium tax for 1943 amounted to $18,496.87; for 1944, $19,670.94. All other state or local taxes paid in 1944 amounted to $3,103.92, making a total for the year for all taxes of $22,780.86.

[16] 322 U. S. 533, dissenting opinion at 590; see note 40, *infra*; cf. Robertson *v.* California, No. 274, decided today.

justified, in spite of warning to proceed with care. 322 U. S. 533, 547 ff.

Prudential's misconception relates not to the necessity for applying, but to the nature and scope of the negative function of the commerce clause. It is not the simple, elgan-cutting tool supposed. Nor is its swath always correlative with that cut by the affirmative edge, as seems to be assumed. For cleanly as the commerce clause has worked affirmatively on the whole, its implied negative operation on state power has been uneven, at times highly variable. More often than not, in matters more governable by logic and less by experience, the business of negative implication is slippery. Into what is thus left open for inference to fill, divergent ideas of meaning may be read much more readily than into what has been made explicit by affirmation. That possibility is broadened immeasurably when not logic alone, but large choices of policy, affected in this instance by evolving experience of federalism, control in giving content to the implied negation. In all our constitutional history this has become no more apparent than in commerce clause dispositions.

That the clause imposes some restraint upon state power has never been doubted. For otherwise the grant of power to Congress would be wholly ineffective. But the limitation not only is implied. It is open to different implications of meaning. And this accounts largely for variations i. this field, continuing almost from the beginning until now.[17] They started with Marshall, and

[17] That the question was discussed but not settled in the Constitutional Convention itself, appears from debate on September 15, 1787, two days before submission of the proposed Constitution to Congress, a portion of which bears quotation:

"Mr. McHenry & Mr. Carrol, moved that 'no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses.'

"Col. Mason in support of this explained and urged the situation of the Chesapeak which peculiarly required expences of this sort.

"Mr. Govr. Morris. The States are not restrained from laying tonnage as the Constitution now Stands. The exception proposed will imply the Contrary, and will put the States in a worse condition than the gentleman (Col. Mason) wishes.

"Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States.—They may certainly be restrained by Treaty. He observed that there were other objects for tonnage duties as the support of Seamen &c. He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.

"Mr. Sherman. The power of the U. States to regulate trade being supreme can controul interferences of the State regulation [when] such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.

Taney, went forward from Waite to Fuller, and have been projected in later differences perhaps less broad, but hardly less controversial.[18] Consequently in its prohibitive, as in its affirmative or enabling, effects the history of the commerce clause has been one of very considerable judicial oscillation.

Moreover, the parallel encompasses the latest turn in the long-run trend. For, concurrently with the broadening of the scope for permissible application of federal authority,[19] the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce,[20] and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic.[21] These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action.

"Mr. Langdon insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it. On motion 'that no State shall lay any duty on tonnage without the Consent of Congress.'

"N. H.—ay Mas. ay. Ct. divd. N. J. ay. Pa. no. Del. ay. M[illegible] Va. no. N-C no S-C ay Geo. no. [Ayes—6; nos.—4; divided—1.]" Farrand, Records of the Federal Constitutional Convention of 1787 (1937), Vol. II, 625,626.

See Note, Congressional Consent to Discriminatory State Legislation (1942) 55 Col. L. Rev. 927, 946 ff., for a short summary of views expressed in the debates and later by members of the Convention. See also Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment (1941) 25 Minn. L. Rev. 432; Hamilton and Adair, The Power to Govern (1937).

[18] "The categories of 'burdens' on interstate commerce, of state laws directly affecting' commerce, etc., are natural concomitants of Marshall's doctrine. The theories as to the silence of Congress are the outgrowth of Taney's. When diverse theories cohabit, the miscegenation may produce strange progeny." Ribble, 204. For tracings of all but the latest of the various trends see the summaries cited in note 7; see also Biklé, The Silence of Congress (1927) 41 Harv. L. Rev. 200. More recent diversities are discussed in Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1, 8 ff. See also e. g., the different views expressed in Nippert v. Richmond, 326 U. S. —, Southern Pacific Co. v. Arizona, 325 U. S. 761; McLeod v. Dilworth Co., 322 U. S. 327; Northwest Airlines v. Minnesota, 322 U. S. 292; and the opinions in Hooven & Allison Co. v. Evatt, 324 U. S. 652. And compare American Mfg. Co. v. St. Louis, 250 U. S. 459, with Adams Mfg. Co. v. Storen, 304 U. S. 307.

[19] See note 11 and text.

[20] Cf., e. g., South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177; Western Live Stock v. Bureau of Revenue, 303 U. S. 250; McGoldrick v. Berwind-White Co., 309 U. S. 33; Nelson v. Sears, Roebuck & Co., 312 U. S. 359; California v. Thompson, 313 U. S. 109; Duckworth v. Arkansas, 314 U. S. 390; Union Brokerage Co. v. Jensen, 322 U. S. 202, 209 ff.

[21] Cf. Nippert v. Richmond, 326 U. S. —, —, notes 9 and 23, and authorities cited.

II.

We are not required however to consider whether, on that level, the authorities on which Prudential chiefly relies would require invalidation of South Carolina's tax. For they are not in point. As has been stated, they are the cases which from *Welton* v. *Missouri*, 91 U. S. 275, until now have outlawed state taxes found to discriminate against interstate commerce.[22] No one of them involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case.

This would seem so obvious as hardly to require further comment, except for the fact that Prudential has argued so earnestly to the contrary. Its position puts the McCarran Act to one side, either as not intended to have effect toward validating this sort of tax or, if construed otherwise, as constitutionally ineffective to do so. Those questions present the controlling issues in this case. But before we turn to them it will be helpful to note the exact effects of Prudential's argument.

Fundamentally it maintains that the commerce clause "of its own force" and without reference to any action by Congress, whether through its silence[23] or otherwise, forbids discriminatory state taxation of interstate commerce. This is to say, in effect, that neither Congress acting affirmatively nor Congress and the

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[22] See note 3, and compare: "... State laws are not invalid under the Commerce Clause unless they actually discriminate against interstate commerce or conflict with a regulation enacted by Congress." Lewis, White & Prince v. Henderson, 305 U. S. 434, dissenting opinion at 446.

"... except for State acts designed to impose discriminatory burdens on interstate commerce because of its interstate character, Congress alone must determine how far [interstate commerce] ... shall be free and untrammeled, how far it shall be burdened by duties and imposts and how far it shall be prohibited." Id. at 455.

See also, for essentially the same position, Adams Mfg. Co. v. Storen, 304 U. S. 307, dissenting opinion; Southern Pac. Co. v. Arizona, 325 U. S. 761, dissenting opinion at 795.

[23] See note 18.

states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant. In this view the limits of state power to regulate commerce in the absence of affirmative action by Congress are also the limits of Congress' permissible action in this respect, whether taken alone or in coordination with state legislation.

Merely to state the position in this way compels its rejection. So conceived, Congress' power over commerce would be nullified to a very large extent.[24] For in all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power. Much less has this boundary been thought to confine what Congress and the states acting together may accomplish. So to regard the matter would invert the constitutional grant into a limitation upon the very power it confers.

The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce. On the contrary, it is, as Marshall declared in *Gibbons* v. *Ogden*, a grant to Congress of plenary and supreme authority over those subjects. The only limitation it places upon Congress' power is in respect to what constitutes commerce, including whatever rightly may be found to affect it sufficiently to make Congressional regulation necessary or appropriate.[25] This limitation, of course, is entirely distinct from the implied prohibition of the commerce clause. The one is concerned with defining commerce, with fixing the outer boundary of the field over which the authority granted shall govern. The other relates only to matters within the field of commerce, once this is defined, including whatever may fall within the "affectation" doctrine. The one limitation bounds the power of Congress. The other confines only the powers of the states. And

[24] Thus, for instance, the limitations upon the length of trains imposed by the Arizona Train Limit Law, and held to be in violation of the commerce clause in Southern Pacific Co. *v.* Arizona, 325 U. S. 761, would be beyond the power of Congress, perhaps also of Congress and the states acting together, to impose; and on commerce clause grounds, thus nullifying the very power conferred in order to regulate such matters. The argument is reminiscent of that of Mr. Justice McLean in the second Wheeling Bridge case, cf. note 34.

[25] Cf. note 11 and text.

the two areas are not coextensive. The distinction is not always clearly observed, for both questions may and indeed at times do arise in the same case and in close relationship.[26] But to blur them, and thereby equate the implied prohibition with the affirmative endowment is altogether fallacious. There is no such equivalence.

This appears most obviously perhaps in the cases most important for the decision in this cause. They are the ones involving situations where the silence of Congress or the dormancy of its power has been taken judicially, on one view or another of its constitutional effects,[27] as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it.[28] Not yet has this Court held such a disclaimer invalid or that state action supported by it could not stand. On the contrary in each instance it has given effect to the Congressional judgment contradicting its own previous one.[29]

It is true that rationalizations have differed concerning those decisions,[30] indeed also that the judges participating in them differed in this respect.[31] But the results have been lasting and are at least as important, for the direction given to the process of accommodating federal and state authority, as the reasons stated for reaching them. None of the decisions conceded, because none involved any question of, the power of Congress to make conclusive its own mandate concerning what is commerce. But apart from that function of defining the outer boundary of its power, whenever Congress' judgment has been uttered affirma-

[26] See the argument for the plaintiff in error in Paul v. Virginia, 8 Wall. 168, 172, 173, as a classic instance.

[27] Cf. note 18. See also the discussions cited in note 7.

[28] Legislation which, typically, has presented the problem is found in a variety of measures, of which the Wilson Act, 26 Stat. 313, is the prototype. Earlier legislation presenting the difficulty was that involved in the second of the Wheeling Bridge cases, Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421. See note 43 for further citations.

[29] Pennsylvania v. Wheeling and Belmont Bridge Co., 13 How. 518, with which compare Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. 421, and The Clinton Bridge, 10 Wall. 454; Leisy & Co. v. Hardin, 135 U. S. 100, with which compare In re Rahrer, 140 U. S. 545; Bowman v. Chicago & Northwestern Ry., 125 U. S. 465, with which compare Clark Distilling Co. v. Western Maryland Ry., 242 U. S. 311.

[30] See, e. g., Ribble, at 62, 106, and other materials cited above in note 7.

[31] For the modern record it is interesting to note that in the first Bridge case Justice McLean spoke for the Court, Chief Justice Taney and Justice Daniel dissenting in separate opinions, and the same division prevailed in the further opinions filed upon consideration of the master's report and entry of the decree. In the second Bridge case Justice Nelson spoke for the Court, with Justices McLean, Grier, Wayne and Daniel each filing separate opinions dissenting on one or more of the issues presented.

tively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval.

Some part of this readjustment may be explained in ways acceptable on any theory of the commerce clause and the relations of Congress and the Courts toward its functioning.[32] Such explanations, however, hardly go to the root of the matter. For the fact remains that, in these instances, the sustaining of Congress' overriding action has involved something beyond correction of erroneous factual judgment in deference to Congress' presumably better-informed view of the facts,[33] and also beyond giving due deference to its conception of the scope of its powers, when it repudiates, just as when its silence is thought to support, the inference that it has forbidden state action.[34]

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[32] Thus, in some instances conceivably the reversal might be rationalized as only one of factual judgment, made in deference to the contrary finding of like character made by a body better able to make such a determination. Moreover, 'Congress' supporting action deprives the Court's adverse view concerning state legislation of any strength which may have been derived from the inference that Congress, by its silence, had impliedly forbidden it. Hence insofar as its judgment may be taken, not as conclusive, but as being entitled to deference here on questions relating to its power (and historically the scope of that deference has been great, cf. note 11), Congress' explicit repudiation of the attitude inferentially attributed to it from its silence, compels reversal of the Court's earlier pronounced view.

[33] In the first Wheeling Bridge case the Court itself made the finding, upon evidence taken by a master, that the bridge in fact obstructed navigation, to which it added the legal conclusion that it was a public nuisance, and went on to specify the height to which it must be raised to avoid this effect. Not only this finding of fact, therefore, but also the legal conclusion drawn from it was, in effect, overturned by the Act of Congress. See note 34. The finding of obstruction in fact depended in no sense upon previous determination by Congress. But the Court found in Congress' prior legislation a policy of freedom for navigation which it applied to outlaw the bridge.

[34] See note 33. "So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the contemplation of law. . . . The regulation of commerce includes intercourse and navigation, and, of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation." Mr. Justice Nelson, speaking for the Court, in the second Wheeling Bridge case, 18 How. 421, 430, 431.

Compare the dissenting opinion of Mr. Justice McLean, who wrote for the majority in the first Wheeling Bridge case, going not only on the ground, among others, that the Act of Congress invaded the judicial function, but also that the Act, apart from this effect, was unconstitutional: "It [Congress] may, under this power, declare that no bridge shall be built which shall be an obstruction to the use of a navigable water. And this, it would seem, is as far as the commercial power of congress can be exercised." 13 How. at 442. Thus was the grant of authority to Congress upon which he relied in the first decision, in part, to outlaw the bridge, converted into a limitation. Cf. text [illegible], Part IV, at note 9 ff.

II

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Prudential has not squarely met this fact. Fixed with the sense of applicability of the *Welton* or *Shelby County* line of cases, it rather has posed an enigma for the bearing of the Bridge and liquor cases upon the decision to be made. It is, if the commerce clause "by its own force" forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?

The answer need not be labored. Prudential in this case makes no contention that commerce is not involved. Its argument is exactly the opposite. Its contention founded on the commerce clause is one wholly of implied prohibition within the field of commerce.

This it regards as operative not only in Congress' silence, but in the face of its positive expression by the McCarran Act that the continued regulation and taxation by the states of the business of insurance is in accord with Congress' policy. That expression raises questions concerning its own validity and also concerning whether the policy stated extends to the kind of state legislation which is immediately in issue. But those questions are not answered, as Prudential seeks to have them answered, by any conception that Congress' declaration of policy adds nothing to the validity of what the states have done within the area covered by the declaration or, in other words, that it is mere *brutum fulmen*. For to do this not only would produce intolerable consequences for restricting Congress' power. It would ignore the very basis on which the second *Wheeling Bridge* case and indeed the *Clark Distilling* case have set the pattern of the law for governing situations like that now presented.[35] Accordingly we turn to the issues which are more alive and significant for the future.

III.

In considering the issues raised by the McCarran Act and the question of its applicability, ground may be cleared by putting aside some matters strenuously argued in the state supreme court and here. First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons

[35] Cf. note 29 and text. And see Part IV.

to be stated, we think that the declaration's effect is clearly to sustain the exaction and that this can be done without violating any constitutional provision.

By the same token, we need not consider whether the tax, if operative in Congress' unilluminated silence, would be discriminatory in the sense of an exaction forbidden by the commerce clause, as Prudential categorically asserts, or not so, as South Carolina maintains with equal certitude. Much attention has been given both here and in the state court to these questions. But in the view we take of the case the controlling issues underrun them. Nor do we determine, as Prudential's argument seems to subsume, whether all of its business done in South Carolina and affected by the tax should be regarded as constituting interstate commerce so as to fall within the "in commerce" classification or, on the other hand, some of it may properly be considered as being only local or intrastate business.[36] These questions we put to one side. And for present purposes we assume that the tax would be discriminatory in the sense of Prudential's contention and that all of its business done in South Carolina and affected by the tax is done "in" or as a part of interstate commerce.

It is not necessary to spend much time with interpreting the McCarran Act. Pertinently it is as follows:

> Sec. 1. The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any

[36] Whether within or without the "affectation" doctrine. Cf. United States v. South-Eastern Underwriters Ass'n, 322 U. S. 533, 548, and authorities cited.

In making these assumptions, however, it is not improper to note that the record, as made in the state court, does not purport to deal factually with the latter question as a matter of proof. It is simply alleged that all of Prudential's South Carolina business is done interstate, an allegation which is denied; and there are supporting allegations concerning the extent of the business and manner of conducting it.

Nor is the case in much better shape factually on the question of discrimination. While the briefs include tables of figures designed to show that Prudential pays more proportionately under the tax than South Carolina corporations pay under other taxes levied against them, cf. note 2, these figures were not made part of the record in the state court until the petition for rehearing was filed, and Prudential has insisted both there and here that they have no proper place in consideration of the questions presented. Its position is that the tax is discriminatory on the face of the statute and without reference to other taxes South Carolina corporations may pay. Cf. note 4.

We express no opinion concerning whether such a showing, in either respect, would be sufficient to require determination of the issues to which it is directed, tendered in the absence of action by Congress.

barrier to the regulation or taxation of such business by the several States.

Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . ." 59 Stat. 34; 15 U. S. C. §§ 1011-1015.[37]

Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.[38] The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it "shall be subject to" the laws of the several states in these respects.

Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.

It would serve no useful purpose now to inquire whether or how far this effort was necessary, in view of the explicit reservations made in the majority opinion in the *South-Eastern* case.

[37] The remainder of the statute, including a proviso to § 2(b), relates to applicability of the Sherman Act and other related federal statutes to the business of insurance before and after January 1, 1948; provides that the McCarran Act shall not affect in any manner the application to that business of the National Labor Relations Act, the Fair Labor Standards Act or the Merchant Marine Act of 1920; extends the term "State" as used in the Act to include specified territories and the District of Columbia; and provides for severability.

[38] See note 37.

Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of legislation must have been some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power.

But, though Congress had no purpose to validate unconstitutional provisions of state laws, except in so far as the Constitution itself gives Congress the power to do this by removing obstacles to state action arising from its own action or by consenting to such laws, H. Rep. No. 143, 79th Cong., 1st Sess., p. 3, it clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for.

Two conclusions, corollary in character and important for this case, must be drawn from Congress' action and the circumstances in which it was taken. One is that Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation,[39] are not required in reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for. This necessarily was a determination by Congress that state taxes, which in its silence might be held invalid as discriminatory, do not place on interstate insurance business a burden which it is unable generally to bear or should not bear in the competition with local business. Such taxes

[39] There is, of course, no constitutional requirement that state taxes must be uniform, in the sense of that requirement as laid upon the federal taxing power by the first clause of Article I, § 8. Nor has it ever been held that such a requirement is made by the commerce clause or any other constitutional provision. This is a different thing entirely from the strictures against discrimination within or by a state laid under the equal protection and commerce clauses.

The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce, is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of Cooley v. Board of Wardens, 12 How. 299, except as otherwise expressly declared.

were not uncommon among the states,[40] and the statute clearly included South Carolina's tax now in issue.

That judgment was one of policy and reflected long and clear experience. For, notwithstanding the long incidence of the tax and its payment by Prudential without question prior to the *South Eastern* decision, the record of Prudential's continuous success in South Carolina over decades[41] refutes any idea that payment of the tax handicapped it in any way tending to exclude it from competition with local business or with domestic insurance companies. Indeed Prudential makes no contrary contention on any factual basis, nor could it well do so. For the *South-Eastern* decision did not, and could not, wipe out all this experience or its weight for bearing, as a matter of the practical consequences resulting from operation of the tax, upon that question. *Robertson v. United States*, No. 274, decided today.

Consequently Prudential's case for discrimination must rest upon the idea either that the commerce clause forbids the state to exact more from it in taxes than from purely local business; or that the tax is somehow technically of an inherently discriminatory character or possibly of a type which would exclude or seriously handicap new entrants seeking to establish themselves in South Carolina. As to each of these grounds, moreover, the argument subsumes that Congress' contrary judgment, as a matter of policy relating to the regulation of interstate commerce, cannot be effective, either "of its own force" alone or as operative in conjunction with and to sustain the state's policy.

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[40] As of the effective date of the McCarran Act, sixteen states had imposed on "foreign" life insurance companies taxes substantially similar to the South Carolina tax in issue. Ala. Code (1940) tit. 51, §§ 816, 819; Fla. Stat. (1941) § 205.43(1), (6); Ill. Rev. Stat. (1943) c. 73, § 1021; Ind. Stat. Ann. (Burns, 1940) § 39-4802; Kan. Gen. Stat. Ann. (Corrick, 1935) § 40-252; Ky. Rev. Stat. (1944) 136.330; La. Gen. Stat. (Dart, 1939) § 8369; Mich. Comp. Laws (1929) § 12387; Mo. Rev. Stat. (1939) § 6094; Neb. Rev. Stat. (1943) § 77-902; N. M. Stat. Ann. (1941) § 60-401; N. D. Comp. Laws (1913) § 4924; Ohio Code Ann. (Throckmorton, 1940) § 5433; Pa. Stat. Ann. (Purdon, 1930) tit. 72, § 2261; S. C. Code Laws (1942) §§ 7948, 7949; Tex. Civ. Stat. (Vernon, 1925) Art. 4769.

We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein.

[41] Prudential was first authorized to do business in South Carolina in 1897 and since that time it has received annual renewals of its license. As to the present scope of its business in South Carolina and in all the states, see note 15.

IV.

In view of all these considerations, we would be going very far to rule that South Carolina no longer may collect her tax. To do so would flout the expressly declared policies of both Congress and the state. Moreover it would establish a ruling never heretofore made and in doing this would depart from the whole trend of decision in a great variety of situations most analogous to the one now presented. For, as we have already emphasized, the authorities most closely in point upon the problem are not, as appellant insists, those relating to discriminatory state taxes laid in the dormancy of Congress' power. They are rather the decisions which, in every instance thus far not later overturned,[42] have sustained coordinated action taken by Congress and the states in the regulation of commerce.[43]

The power of Congress over commerce exercised entirely without reference to coordinated action ~~taken by~~ of the states is not restricted, except as the Constitution expressly provides,[44] by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate com-

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[42] Cf. Ashton *v.* Cameron County District, 298 U. S. 513, which may be said in effect to have been overruled by United States *v.* Bekins, 304 U. S. 27. See Jackson, The Struggle for Judicial Supremacy (1941) 240-241.

[43] See Carmichael *v.* Southern Coal Co., 301 U. S. 495; Steward Machine Co. *v.* Davis, 301 U. S. 548; Kentucky Whip & Collar Co. *v.* Illinois Central R. Co., 299 U. S. 334; Clark Distilling Co. *v.* Western Maryland Ry. Co., 242 U. S. 311; Whitfield *v.* Ohio, 297 U. S. 431; In re Rahrer, 140 U. S. 545; Perkins *v.* Pennsylvania, 314 U. S. 586; Standard Dredging Co. *v.* Murphy, 319 U. S. 306, 308; International Shoe Co. *v.* Washington, 66 Sup. Ct. 154, 157-158; *cf.* Parker *v.* Richard, 250 U. S. 235, 238-239. See generally Konig, Federal and State Cooperation under the Constitution (1938) 36 Mich. L. Rev. 752.

[44] North American Co. *v.* Securities and Exchange Commission, 327 U. S. —, —; United States *v.* Darby Lumber Co., 312 U. S. 100, 114-115; Gibbons *v.* Ogden, 9 Wheat. 1, 196. For example, the provisions of Article I, § 9, forbidding the giving of preferences "by any Regulation of Commerce or Revenue to the Ports of one State over those of another"; and comparable that "No Tax or Duty shall be laid on Articles exported from any State," held applicable only to foreign commerce in Dooley *v.* United States, 182 U. S. 151.

But compare the further provision of Article I, § 9, empowering Congress to consent to laying of duties or imposts on exports by the states. See also note 47.

merce, as it has done frequently and for a great variety of reasons.[45] That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states.

This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states,[46] in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.[47] Here both

[45] E. g., Reid *v.* Colorado, 187 U. S. 137; Champion *v.* Ames, 188 U. S. 321; Hipolite Egg Co. *v.* United States, 220 U. S. 45; Hoke *v.* United States, 227 U. S. 308; United States *v.* Darby Lumber Co., 312 U. S. 100, overruling Hammer *v.* Dagenhart, 247 U. S. 251.

[46] See cases cited in notes 29 and 43.

[47] It is perhaps impossible to point with certainty to any such explicit limitation among the various commerce clauses of the Constitution; for decision in the application of such provisions to such a combined exercise of powers is sparse. See, however, the discussion in Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 421, 433 *et seq.*, relating to the clause of Article I, § 9, providing: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another."

There can be no doubt that the combined exercise of state and federal authority is limited, to some but largely undefined extent, by other constitutional prohibitions or the combined effects of more than one. Cf. text herein at note 49 *et seq.* But apart from the provision of Article I, § 9, above quoted as a possible exception, the specific limitations placed upon the commerce power or state power in relation to commerce expressly provide for joint action to be effective. Thus, this is true with reference to laying of duties on exports by the states with the consent of Congress, Art. I, § 10, notwithstanding the prohibition of such action by Congressional action alone, Art. I, § 9, and of course by state action alone, Art. I, § 10. And note the further provision that: "No State shall, without the Consent of Congress, lay any Duty of Tonnage," as to which see also note 17 above.

It was thus expressly contemplated, in some instances, that the combined exercise of the powers of Congress and the states should be free from restrictions expressly applicable to each when exerted in isolation. It is true that some of these provisions have been held applicable only to foreign commerce, e. g., the prohibition of Article I, § 10, against levy of duties on imports or exports without Congress' consent. Woodruff *v.* Parham, 8 Wall. 123; American Steel & Wire Co. *v.* Speed, 192 U. S. 500, 519, *et seq.*; but see Brown *v.* Maryland, 12 Wheat. 419. But others apply to coastwise trade indeed to trade between towns in the same state, in other words to intrastate commerce. State Tonnage Tax Cases, 12 Wall. 204, 219; and see Pennsylvania

Congress and South Carolina have acted, and in complete coordination, to sustain the tax. It is therefore reinforced by the exercise of all the power of government residing in our scheme." Clear and gross must be the evil which would nullify such an exertion, one which could arise only by exceeding beyond cavil some explicit and compelling limitation imposed by a constitutional provision or provisions designed and intended to outlaw the action taken entirely from our constitutional framework.

In this light the argument that the degree of discrimination which South Carolina's tax has involved, if any, puts it beyond the power of government to continue must fall of its own weight. No conceivable violation of the commerce clause, in letter or spirit, is presented. Nor is contravention of any other limitation.

A word should be added in the latter respect. Prudential has not urged grounds founded upon other constitutional provisions than the commerce clause, except in relation to the McCarran Act and then only in the event it should be construed as having effect to validate continued exaction of the tax. As has been said, it regards the statute as neither intended nor effective to "validate, authorize, or sanction state statutes which discriminate against interstate commerce." But, against the event that the Act should be taken as intended to have such an effect, it puts forward the somewhat novel contention that the statute would be in violation

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v. Wheeling and Belmont Bridge Co., *supra*; Louisiana Pub. Ser. Comm. *v.* Texas & N. O. R. Co., 284 U. S. 125; *cf.* Williams *v.* United States, 289 U. S. 336; and see also United States *v.* The William, 28 Fed. Cas. No. 16,700.

All these provisions are intimately and expressly related to the commerce power. Notwithstanding their diversities, in application to interstate and foreign commerce or both, and also to federal and state power or their combined operation, no conclusion can be drawn from them that our constitutional policy was, or is, to give Congress and the states acting together broad powers, in some instances denied to each acting alone, in relation to foreign commerce, but to deny such authority altogether in reference to interstate commerce. Indeed the opposite conclusion is clearly indicated, both by virtue of express provision where applicable and by strong inference where not expressly forbidden.

48 The ruling is not new or only recent. "We have already seen, and the principle is undoubted, that the Act of the Legislature of Virginia conferred full authority to erect and maintain a bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. This body having, in the exercise of this power, regulated the navigation consistently with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of governments, state and federal, which, if not sufficient, certainly none can be found in our system of government." Pennsylvania *v.* Wheeling and Belmont Bridge Co., 18 How. 421, 430. Compare this with Mr. Justice McLean's dissenting view, note 34 above.

of the due process clause of the Fifth Amendment; of the first clause of Article I, § 8, requiring that "all Duties, Imposts and Excises shall be uniform throughout the United States"; of Article I, § 1, "which requires legislation to be enacted by Congress"; and, apparently of the Tenth Amendment, "as a violation of the states' power to tax for purposes of raising revenue *for their own use*, which power is vested exclusively in the states."[49]

These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision, that the similar provision of the Fourteenth Amendment, as well as that requiring equal protection of the laws, does not forbid the states to lay and collect such a tax as South Carolina's.[50] Certainly the Fifth Amendment does not more narrowly confine the power of Congress; nor do it and the Fourteenth taken together accomplish such a restriction upon the coordinated exercise of power by the Congress and the states.

The argument grounded upon the first clause of Article I, §8, requiring that excises shall be uniform throughout the United States, identifies the state exaction with the laying of an excise by Congress, to which alone the limitation applies. This is done on the theory that no more has occurred than that Congress has "adopted" the tax as its own, a conception which obviously ignores the state's exercise of its own power and, furthermore, seeks to restrict the coordinated exercise of federal and state authority

[49] The contentions are stated in appellant's brief as follows: "If it be assumed that the McCarran-Ferguson Act is an adoption by Congress of legislation of the states, then the Act is unconstitutional (1) as a violation of the due process clause of Fifth Amendment to the Constitution; (2) as a violation of Article I, Section 8, Clause 1 of the Constitution which requires that excises shall be uniform throughout the United States in the exercise by Congress of its taxing power, (3) as a violation of Article I, Section 1 of the Constitution which requires legislation to be enacted by Congress, and (4) as a violation of the states' power to tax for purposes of raising revenue *for their own use*, which power is vested exclusively in the states."

[50] "... It has never been held that a State may not exact from a foreign insurance corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders." Lincoln National Life Ins. Co. *v.* Reid, 325 U. S. 673, 677. See Ducat *v.* Chicago, 10 Wall. 410; Fire Assn. of Philadelphia *v.* New York, 119 U. S. 110; Hanover Fire Ins. Co. *v.* Harding, 272 U. S. 494; Continental Assurance Co. *v.* Tennessee, 311 U. S. 5. See discussion in Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 101 ff.

by a limitation applicable only to the federal taxing power when it is exerted without reference to any state action.[51] The same observation applies also to the contention based on Article I, [illegible]. The final contention that to sustain the Act, and thus the tax, would be an invasion of the state's own power of taxation is so clearly lacking in merit as to call for no comment other than to point out that, by juxtaposition with the contentions discussed in the preceding paragraph, the effect would be at one stroke to bring the Act into collision with limitations operative only upon the federal power and at the same time to nullify state authority.

No such anomalous consequence follows from the division of legislative power into the respective spheres of federal and state authority. There are limitations applicable to each of these separately and some to their coordinated exercise. But neither the former nor the latter are to be found merely in the fact that the authority is thus divided. Such a conception would reduce the joint exercise of power by Congress and the states to achieve common ends in the regulation of our society below the effective range of either power separately exerted, without basis in specific constitutional limitation or otherwise than in the division itself.[52] We know of no grounding, in either constitutional experience or spirit, for such a restriction. For great reasons of policy and history not now necessary to restate, these great powers were separated. They were not forbidden to cooperate or by doing so to achieve legislative consequences, particularly in the great fields of regulating commerce and taxation, which, to some extent at least, neither could accomplish in isolated exertion.[53]

We have considered appellant's other contentions, including the suggestion that the McCarran Act, construed as we have

[51] The related contention that Congress' "adoption" of South Carolina's statute amounts to an unconstitutional delegation of Congress' legislative power to the states obviously confuses Congress' power to legislate with its power to consent to state legislation. They are not identical, though exercised in the same formal manner. See Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311, 327.

[52] "It would be a shocking thing, if state and federal governments acting together were prevented from achieving the end desired by both, simply because of the division of power between them." Ribble, 211. And see [illegible]

[53] Cf. note 47.

terpreted it and thus given effect, would involve an unconstitutional delegation by Congress of its power to the states. For reasons already set forth and others, including the fact that no instance of delegation is involved on the facts, we find them without merit.

The judgment accordingly is

Affirmed.

Mr. Justice BLACK concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.